152 U.S. 539

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1035.

MICHAEL DEALY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

FILED OCTOBER 9, 1893.

(15,419.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 19, 1894.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 7th day of August, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and eighteenth year.

Seal United States District Court, North Dakota.

J. A. MONTGOMERY,
Clerk United States District Court, District of North Dakota.
By H. G. EDWARDS,
Deputy Clerk.

Allowed by—
MELVILLE W. FULLER,
Chief Justice of the Supreme Court of the United States.

1½ DISTRICT OF NORTH DAKOTA, *ss:*

I, J. A. Montgomery, clerk of the district court of the United States for the district of North Dakota, do hereby certify that in obedience to the command of the within writ I herewith transmit to the United States Supreme Court a true and correct copy of the record and proceedings in the within-entitled cause.

Seal United States District Court, North Dakota.

Witness my hand and official seal this 15 day of August, A. D. 1893, at my office, in Fargo, in said district.

J. A. MONTGOMERY,
Clerk of the U. S. District Court, District of North Dakota.
By H. G. EDWARDS, *Deputy.*

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a United States Supreme Court, to be holden at Washington within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States district court of the district of North Dakota, in an action wherein The United States of America is plaintiff and Michael Dealy and others defendants, in a criminal action for the crime of conspiracy to defraud the United States, alleged to have been committed within said district, in which said Michael Dealy is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment and sentence rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Alfred D. Thomas, judge of the district court of the United States for the district of North Dakota, this 8th day of August, in the year of our Lord one thousand eight hundred and ninety-three.

ALFRED D. THOMAS,
U. S. District Judge, District of North Dakota.

2½ DISTRICT OF NORTH DAKOTA, *ss:*

On this 15th day of August, in the year of our Lord one thousand eight hundred and ninety-three, personally appeared W. S. Daggett, a deputy U. S. marshal for the district of North Dakota, and makes oath that he delivered a true copy of the within citation to Edgar W. Camp, Esq., the district attorney of the United States for the district of North Dakota.

WM. S. DAGGETT.

Sworn to and subscribed the 15th day of August, A. D. 1893.

[Seal United States District Court, North Dakota.]

H. G. EDWARDS,
Deputy Clerk U. S. District Court, District of N. Dakota.

[Endorsed:] U. S. district court, district of N. Dakota. United States *vs.* Michael Dealy *et al.* Citation.

3 Know all men by these presents that we, Michael Dealy, of Rolla, North Dakota, as principal; James Pinkerton, of Rolla, North Dakota, and Michael O'Laughlin, of Rolla, North Dakota, as sureties, are held and firmly bound unto the United States of America in the full and just sum of five hundred dollars, to be paid to the said The United States of America, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eighth day of August, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas lately, at a term of the U. S. district court for the State of North Dakota, in a suit depending in said court between The United States, as plaintiffs, and Michael Dealy, the principal, and others, as defendants, in an action against defendants for the crime of conspiracy to defraud the United States, a judgment was rendered against the said Michael Dealy sentencing him to be committed to the penitentiary at Sioux Falls, South Dakota, for one year and one month and to pay a fine of one thousand dollars, and the said Michael Dealy having filed his petition in error praying for a reversal of said judgment, which writ was allowed, and having obtained a supersedeas and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The United States of America, citing and admonishing it to be and appear at a United States Supreme Court to be holden at Washington on the — day of ——, 189–:

Now, the condition of the above obligation is such that if the said Michael Dealy shall prosecute said writ to effect and answer

all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

MICHAEL DEALY. [SEAL.]
JAMES PINKERTON. [SEAL.]
MICHAEL O'LAUGHLIN. [SEAL.]

Sealed and delivered in presence of—
H. H. FRITZ.
JAS. O'LAUGHLIN.

Approved by—
ALFRED D. THOMAS,
U. S. Dist. Judge for the Dist. of North Dakota.

3½ [Endorsed:] No. —. United States Supreme Court. —— —— *vs.* —— ——. Bond for damages and costs. Filed Aug. 9th, 1893. J. A. Montgomery, clerk, by H. G. Edwards, deputy.

STATE OF NORTH DAKOTA, } ss:
County of Rolette, }

Personally appeared before me James Pinkerton and Michael O'Laughlin, well known to me as the persons who signed the within bond as sureties, and, first being duly sworn, each for himself says that he is a resident and freeholder of the State of North Dakota and worth the amount of one thousand dollars above his debts and liabilities and exclusive of his property exempt from execution.

JAMES PINKERTON.
MICHAEL O'LAUGHLIN.

Sworn and subscribed before me this eighth day of August, 1893.

[Seal Charles Jas. Partridge, Notary Public, State of North Dakota.]

CHARLES JAS. PARTRIDGE,
Notary Public, N. D.

4 UNITED STATES OF AMERICA, }
District of North Dakota, }

United States District Court.

Pleas before the Honorable Alfred D. Thomas, judge of the United States district court for the district of North Dakota, sitting in said district court at the adjourned February term, 1893, thereof.

THE UNITED STATES OF AMERICA }
vs. } 190.
WILLIAM W. ALLEN, MICHAEL DEALY, EDWARD LABERGE, PETER THIBERT, and H. H. FRITZ, Defendants. }

Be it remembered that on the 16th day of December, A. D. 1892, an indictment was presented in open court and filed in said case; which said indictment is in words and figures following, to wit:

5 THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, }
District of North Dakota. }

In the United States District Court for the District of North Dak.

In the United States district court holden in and for the district of North Dakota, sitting for trial of all crimes, public offenses, and cases arising under the Constitution and laws of the United States, and having and exercising jurisdiction in the trial of all offenses and cases vested in the circuit and district courts of the United States, at a term thereof held in and for said district of North Dakota, at the city of Grand Forks, in said district, beginning on the 6th day of December, A. D. 1892.

THE UNITED STATES OF AMERICA }
vs. }
WILLIAM W. ALLEN, MICHAEL DEALEY, EDWARD LABERGE, } 5440.
and PETER THIBERT and H. H. FRITZ. }

Indictment.

The grand jurors of the grand jury of the United States in and for the district of North Dakota, inquiring of all crimes, public offenses against the laws of the United States committed and triable in said district, having been first duly and legally empanelled, charged, and sworn, upon their oaths present—

That on the first day of April, in the year of our Lord one thousand eight hundred and ninety-one, in the county of Rolette, State of North Dakota, and within the jurisdiction of this court, one William W. Allen, one Michael Daley, one Edward Laberge, one Peter Thibert, and one H. H. Fritz, and others to the grand jury unknown did commit the crime of conspiracy to defraud the United States, committed as follows:

That at the time and place aforesaid the said William W. Allen, Michael Daley, Edward Laberge, Peter Thibert, and H. H. Fritz, and others to the grand jury unknown did falsely, unlawfully, and wickedly conspire, combine, confederate, and agree together among themselves to defraud the United States of the title and possession of large tracts of land in said county of great value by means of false, feigned, illegal, and fictitious entries of said lands under the homestead laws of the United States, the said lands being then and there public lands of the United States, open to entry under said homestead laws at the local land office of the United States at Devil's Lake City, in said State, and that according to and in pursu-
6 ance of said conspiracy, combination, confederacy, and agreement among themselves had as aforesaid the said Allen did persuade and induce one Charles Pattanude to make filing under said homestead laws and thereafter to make proof and final entry under said laws for the lands known and described as follows: The south half of the northeast quarter and lots one and two of section six, in township one hundred and sixty-three north, of range

70 west, of the fifth principal meridian, said lands lying and being in said county, on which said lands said Pattnaude, as said Allen then and there well knew, had never made settlement, improvement, or residence, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

7 Second. And the grand jurors aforesaid upon their oaths aforesaid do further find and present that at the time and place aforesaid said William W. Allen and Michael Daley and Edward Laberge and Peter Thibert, H. H. Fritz, and others to the jury unknown falsely, unlawfully, and wickedly did conspire, combine, confederate, and agree among themselves to defraud the United States of the title and possession of public lands of the United States of great value, subject to entry under the homestead laws of the United States at the local land office of the United States, at Devil's Lake City, in said State, by means of false, feigned, illegal, and fictitious entries of such lands under said laws at said land office, and that according to and in pursuance of said conspiracy, combination, confederation, and agreement the said Daley did fraudulently and unlawfully induce and persuade one Frank Premeau to appear as a witness for one Charles Pattnaude in making final proof under said laws before H. H. Fritz, clerk of the district court of the State of North Dakota, in and for said county, being a court of record of said State, and as such witness before said Fritz to testify and make proof for said Pattnaude in effect that he had resided for more than five years immediately preceding the time of making said proof on the lands known and described as south half of northeast quarter of and lots one and two of section six, in township 163 north, of range 70 west, of the fifth principal meridian, lying and being in said county, public lands of the United States and subject to entry under said laws of said land office; whereas in fact said Pattnaude, as said Daley well knew, had never resided on said land at any time within five years prior to making such proof, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

8 Third. And the grand jurors aforesaid upon their oaths aforesaid do further find and present that at the time and place aforesaid said William W. Allen and Michael Dealy and Edward Laberge and Peter Thibert and H. H. Fritz and others to the jury unknown falsely, unlawfully, and wickedly did conspire, combine, confederate, and agree among themselves to defraud the United States of the title and possession of public lands of the United States of great value, subject to entry under the homestead laws of the United States at the local land office of the United States at Devil's Lake City, in said State, by means of false, feigned, illegal, and fictitious entries of such lands under said laws at said land office, and that, according to and in pursuance of said conspiracy, combination, confederation, and agreement, the said Allen did fraudulently and unlawfully induce and persuade one Frank Premeau to appear as a witness for one Charles Pattnaude in

making final proof under said laws before H. H. Fritz, clerk of the district court of the State of North Dakota in and for said county, being a court of record of said State, and as such witness before said Fritz to testify and make proof for said Pattnaude in effect that he had resided for more than five years immediately preceding the time of making said proof on the lands known and described as south half of the northeast quarter and lots one and two of section six, township 163, range 70 west, of 5th P. M., lying and being in said county, public lands of the United States and subject to entry under said laws of said land office, whereas in fact said Pattnaude, as said Allen well knew, had never resided on said land at any time within five years prior to making such proof, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

9 Fourth. And the grand jurors aforesaid upon their oaths aforesaid do further find and present that at the time and place aforesaid said William W. Allen and Michael Daley and Edward Laberge and Peter Thibert, H. H. Fritz, and others to the jury unknown fals-ly, unlawfully, and wickedly did conspire, combine, confederate, and agree among themselves to defraud the United States of the title and possession of public lands of the United States of great value, subject to entry under the homestead laws of the United States at the local land office of the United States at Devil's Lake City, in said State, by means of false, feigned, illegal, and fictitious entries of such lands under said laws at said land office, and that according to and in pursuance of said conspiracy, combination, confederation, and agreement the said Allen did fraudulently and unlawfully induce and pursuade one Patrice Morriseau to appear as a witness for one Charles Pattnaude in making final proof under said laws before H. H. Fritz, clerk of the district court of the State of North Dakota in and for said county, being a court of record of said State, and as such witness before said Fritz to testify and make proof for said Pattnaude in effect that he had resided for more than five years immediately preceding the time of making said proof on the lands known and described as south half of northeast quarter and lots one and two of section —, in township 163 north, of range 70 west, of the fifth principal meridian, lying and being in said county, public lands of the United States and subject to entry under said laws of said land office, whereas, in fact, said Pattnaude, as said Allen well knew, had never resided on said land at any time within five years prior to making such proof, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

10 Fifth. And the grand jurors aforesaid upon their oaths aforesaid do further find and present that at the time and place aforesaid said William W. Allen and Michael Daley and Edward Laberge and Peter Thibert, H. H. Fritz, and others to the jury unknown falsely, unlawfully, and wickedly did conspire, combine, confederate, and agree among themselves to defraud the United States of the title and possession of public lands of the United States of great

value, subject to entry under the homestead laws of the United States at the local land office of the United States at Devil's Lake City, in said State, by means of false, feigned, illegal, and fictitious entries of such lands under said laws at said land office, and that according to and in pursuance of said conspiracy, combination, confederation, and agreement the said Daley did fraudulently and unlawfully induce and pursuade one Toby Maran to appear as a witness for one Alexander Sayer in making final proof under said laws before H. H. Fritz, clerk of the district court of the State of North Dakota in and for said county, being a court of record of said State, and as such witness before said Fritz to testify and make proof for said Sayer in effect that he had resided for more than five years immediately preceeding the time of making said proof on the lands known and described as southwest quarter of section 29, in township 163 north, of range 70 west, of the fifth principal meridian, lying and being in said county, public lands of the United States and subject to entry under said laws of said land office, whereas, in fact, said Sayer, as said Daley well knew, had never resided on said land at any time within five years prior to making such proof, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

11 Sixth. And the grand jurors aforesaid upon their oaths aforesaid do further find and present that at the time and place aforesaid said William W. Allen and Michael Daley and Edward Laberge and Peter Thibert, H. H. Fritz, and others to the jury unknown falsely, unlawfully, and wickedly did conspire, combine, confederate, and agree among themselves to defraud the United States of the title and possession of public lands of the United States of great value, subject to entry under the homestead laws of the United States at the local land office of the United States at Devil's Lake City, in said State, by means of false, feigned, illegal, and fictitious entries of such lands under said laws at said land office, and that according to and in pursuance of said conspiracy, combination, confederation, and agreement the said Thibert did fraudulently and unlawfully induce and pursuade one Toby Moran to appear as a witness for one Alexander Sayer in making final proof under said laws before H. H. Fritz, clerk of the district court of the State of North Dakota in and for said county, being a court of record of said State, and as such witness before said Fritz, to testify and make proof for said Sayer in effect that he had resided for more than five years immediately preceeding the time of making said proof on the lands known and described as southwest quarter of section 29, in township 163 north, of range 70 west, of the fifth principal meridian, lying and being in said county, public lands of the United States and subject to entry under said laws of said land office, whereas, in fact, said Sayer, as said Thibert well knew, had never resided on said land at any time within five years prior to making such proof, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

12 Seventh. And the grand jurors aforesaid upon their oaths aforesaid do further find and present that at the time and place aforesaid said William W. Allen and Michael Dealy and Edward Laberge and Peter Thibert and H. H. Fritz and others to the jury unknown falsely, unlawfully, and wickedly did conspire, combine, confederate, and agree among themselves to defraud the United States of the title and possession of public lands of the United States of great value, subject to entry under the homestead laws of the United States at the local land office of the United States at Devil's Lake City, in said State, by means of false, feigned, illegal, and fictitious entries of such lands under said laws at said land office, and that according to and in pursuance of said conspiracy, combination, confederation, and agreement the said Laberge did fraudulently and unlawfully induce and persuade one Wm. Flaurie to appear as a witness for one Leo Jennett in making final proof under said laws before said Laberge, said Laberge being a deputy clerk of the district court of the State of North Dakota in and for said county, being a court of record of said State, and as such witness before said Laberge to testify and make proof for said Leo Jennett in effect that he had resided for more than five years immediately preceding the time of making said proof on the lands known and described as northwest quarter of sec. 8, town 163, range 70 west, of 5th p. m., lying and being in said county, public lands of the United States and subject to entry under said laws of said land office, whereas in fact said Leo Jennett, as said Laberge well knew, had never resided on said land at any time within five years prior to making such proof, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

13 Eighth. And the grand jurors aforesaid upon their oaths aforesaid do further find and present that at the time and place aforesaid said William W. Allen and Michael Dealy and Edward Laberge and Peter Thibert and H. H. Fritz and others to the jury unknown falsely, unlawfully, and wickedly did conspire, combine, confederate, and agree among themselves to defraud the United States of the title and possession of public lands of the United States of great value, subject to entry under the homestead laws of the United States at the local land office of the United States at Devil's Lake City, in said State, by means of false, feigned, illegal, and fictitious entries of such lands under said laws at said land office, and that according to and in pursuance of said conspiracy, combination, confederation, and agreement the said Laberge did fraudulently and unlawfully induce and persuade one Gaspard Jumott to appear as a witness for one Leo Jennett in making final proof under said laws before him, said Laberge being a deputy clerk of the district court of the State of North Dakota in and for said county, being a court of record of said State, and as such witness before said Laberge to testify and make proof for said Leo Jennett in effect that he, said Leo, had resided for more than five years immediately preceding the time of making said proof on the lands known and described as N. W. ¼ sec. 8, 163, 70, lying and being in said county,

public lands of the United States and subject to entry under said laws of said land office, whereas, in fact, said Leo Jennett, as said Laberge well knew, had never resided on said land at any time within five years prior to making such proof, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

14 Ninth. And the grand jurors aforesaid upon their oaths aforesaid do further find and present that at the time and place aforesaid said William W. Allen, said Michael Daley, said Edward Laberge, said Peter Thibert, H. H. Fritz, and others to the jury unknown falsely, unlawfully, and wickedly did conspire, combine, confederate, and agree among themselves to defraud the United States of the title and possession of certain lands in said county, being public lands of the United States of great value, open to entry at the local land office of the United States at Devil's Lake City, in said State, by means of false, feigned, illegal, and fictitious entries of said lands under said homestead laws, and that according to and in pursuance of said conspiracy, combination, confederacy, and agreement among themselves had as aforesaid the said Thibert did pursuade and induce one Leo Jennett to make filing under said homestead laws for the lands known and described as follows: Northwest quarter of section 8, in township 163 north, of range 70 west, of the fifth principal meridian, said lands lying and being in said county, on which said lands said Leo Jennett, as said Thibert then and there well knew, had never made settlement, improvement, or residence, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

15 Tenth. And the grand jurors aforesaid upon their oaths aforesaid do further find and present that at the time and place aforesaid said William W. Allen, said Michael Dealy, said Edward Laberge, said Peter Thibert, and H. H. Fritz and others to the jury unknown falsely, unlawfully, and wickedly did conspire, combine, confederate, and agree among themselves to defraud the United States of the title and possession of certain lands in said county, being public lands of the United States of great value, open to entry at the local land office of the United States at Devil's Lake City, in said State, by means of false, feigned, illegal, and fictitious entries of said lands under said homestead laws, and that according to and in pursuance of said conspiracy, combination, confederacy, and agreement among themselves had as aforesaid the said Laberge did pursuade and induce one Leo Jennett to make filing under said homestead laws and thereafter to make proof and final entry under said laws for the lands known and described as follows: Northwest quarter of section eight, township 163, range 70 west of the fifth principal meridian, said lands lying and being in said county, on which said lands said Jennett, as said Laberge then and there well knew, had never made settlement, improvement, or residence, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

16 Eleventh. And the grand jurors aforesaid upon their oaths aforesaid do further find and present that at the time and place aforesaid said William W. Allen, said Michael Dealy, said Edward Laberge, said Peter Thibert, and H. H. Fritz and others to the jury unknown falsely, unlawfully, and wickedly did conspire, combine, confederate, and agree among themselves to defraud the United States of the title and possession of certain lands in said county, being public lands of the United States of great value, open to entry at the local land office of the United States at Devil's Lake City, in said State, by means of false, feigned, illegal, and fictitious entries of said lands under said homestead laws, and that according to and in pursuance of said conspiracy, combination, confederacy, and agreement among themselves had as aforesaid the said Allen did persuade and induce one Leo Jennett to make filing under said homestead laws and thereafter to make proof and final entry under said laws for the lands known and described as follows: Northwest quarter of section 8, in township 163 north, of range 70 west, of the fifth principal meridian, said lands lying and being in said county, on which said lands said Jennett, as said Allen then and there well knew, had never made settlement, improvement, or residence, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

17 Twelfth. And the grand jurors aforesaid, upon their oaths aforesaid, do further find and present that at the time and place aforesaid said William W. Allen, said Michael Dealy, said Edward Laberge, said Peter Thibert and H. H. Fritz, and others to the jury unknown falsely, unlawfully, and wickedly did conspire, combine, confederate, and agree among themselves to defraud the United States of the title and possession of certain lands in said county, being public lands of the United States, of great value, open to entry at the local land office of the United States at Devil's Lake City, in said State, by means of false, feigned, illegal, and fictitious entries of said lands under said homestead laws, and that according to and in pursuance of said conspiracy, combination, confederacy, and agreement among themselves had as aforesaid the said Laberge did persuade and induce one John Azure to make filing under said homestead laws and thereafter to make proof and final entry under said laws for the lands known and described as follows: Southwest quarter of section 8, township 163 north, of range 70 west, of the fifth principal meridian, said lands lying and being in said county, on which said lands said Azure, as said Laberge then and there well knew, had never made settlement, improvement, or residence, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

18 Thirteenth. And the grand jurors aforesaid, upon their oaths aforesaid, do further find and present that at the time and place aforesaid said William W. Allen, said Michael Dealy, said Edward Laberge, said Peter Thibert and H. H. Fritz, and others to the jury unknown falsely, unlawfully, and wickedly did conspire,

combine, confederate, and agree among themselves to defraud the United States of the title and possession of certain lands in said county, being public lands of the United States, of great value, open to entry at the local land office of the United States at Devil's Lake City, in said State, by means of false, feigned, illegal, and fictitious entries of said lands under said homestead laws, and that according to and in pursuance of said conspiracy, combination, confederacy, and agreement among themselves had as aforesaid the said Allen did pursuade and induce one John Azure to make filing under said homestead laws and thereafter to make proof and final entry under said laws for the lands known and described as follows: Southwest quarter of section 8, township 163 north, of range 70 west, of the fifth principal meridian, said lands lying and being in said county, on which said lands said Azure, as said Allen then and there well knew, had never made settlement, improvement, or residence, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

19 Fourteenth. And the grand jurors aforesaid, upon their oaths aforesaid, do further find and present that at the time and place aforesaid said William W. Allen, said Michael Dealy, said Edward Laberge, said Peter Thibert and H. H. Fritz, and others to the jury unknown falsely, unlawfully, and wickedly did conspire, combine, confederate, and agree among themselves to defraud the United States of the title and possession of certain lands in said county, being public lands of the United States, of great value, open to entry at the local land office of the United States at Devil's Lake City, in said State, by means of false, feigned, illegal, and fictitious entries of said lands under said homestead laws, and that according to and in pursuance of said conspiracy, combination, confederacy, and agreement among themselves had as aforesaid the said Daley did pursuade and induce one Alexander Sayer to make filing under said homestead laws and thereafter to make proof and final entry under said laws for the lands known and described as follows: Southwest quarter of section 29, in township 163 north, of range 70 west, of the fifth principal meridian, said lands lying and being in said county, on which said lands said Sayer, as said Daley then and there well knew, had never made settlement, improvement, or residence, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

20 Fifteenth. And the grand jurors aforesaid, upon their oaths aforesaid, do further find and present that at the time and place aforesaid said William W. Allen, said Michael Dealy, said Edward Laberge, said Peter Thibert and H. H. Fritz, and others to the jury unknown falsely, unlawfully, and wickedly did conspire, combine, confederate, and agree among themselves to defraud the United States of the title and possession of certain lands in said county, being public lands of the United States, of great value, open to entry at the local land office of the United States at Devil's Lake City, in said State, by means of false, feigned, illegal, and fictitious entries

of said lands under said homestead laws, and that according to and in pursuance of said conspiracy, combination, confederacy, and agreement among themselves had as aforesaid the said Laberge did pursuade and induce one Alexander Sayer to make filing under said homestead laws and thereafter to make proof and final entry under said laws for the lands known and described as follows: Southwest quarter of section 29, township 163 north, of range 70 west, of the fifth principal meridian, said lands lying and being in said county, on which said lands said Sayer, as said Laberge then and there well knew, had never made settlement, improvement, or residence, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

21 Sixteenth. And the grand jurors aforesaid, upon their oaths aforesaid, do further find and present that at the time and place aforesaid said William W. Allen, said Michael Daley, said Edward Laberge, said Peter Thibert, H. H. Fritz, and others to the jury unknown falsely, unlawfully, and wickedly did conspire, combine, confederate, and agree among themselves to defraud the United States of the title and possession of certain lands in said county, being public lands of the United States, of great value, open to entry at the local land office of the United States at Devil's Lake City, in said State, by means of false, feigned, illegal, and fictitious entries of said lands under said homestead laws, and that according to and in pursuance of said conspiracy, combination, confederacy, and agreement among themselves had as aforesaid the said Fritz did pursuade and induce one Alexander Sayer to make filing under said homestead laws for the lands known and described as follows: Southwest quarter of section 29, in township 163 north, of range 70 west, of the fifth principal meridian, said lands lying and being in said county, on which said lands said Sayer, as said Fritz then and there well knew, had never made settlement, improvement, or residence, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

22 Seventeenth. And the grand jurors aforesaid, upon their oaths aforesaid, do further find and present that at the time and place aforesaid said William W. Allen, said Michael Daley, said Edward Laberge, said Peter Thibert, H. H. Fritz, and others to the jury unknown falsely, unlawfully, and wickedly did conspire, combine, confederate, and agree among themselves to defraud the United States of the title and possession of certain lands in said county, being public lands of the United States, of great value, open to entry at the local land office of the United States at Devil's Lake City, in said State, by means of false, feigned, illegal, and fictitious entries of said lands under said homestead laws, and that according to and in pursuance of said conspiracy, combination, confederacy, and agreement among themselves had as aforesaid the said Thibert did pursuade and induce one Charles Pattnaude to make filing under said homestead laws for the lands known and described as follows: South of the northeast quarter and lots one & two, in

township 163 north, of range 70 west, of the fifth principal meridian, said lands lying and being in said county, on which said lands said Pattnaude, as said Thibert then and there well knew, had never made settlement, improvement, or residence, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

D. P. KUHN,
Foreman of the Grand Jury.

EDGAR W. CAMP, *U. S. Atty.*

Witnesses examined before the grand jury:
John Azure, Leo Jennotte, Alexander Stayer, Charles Pattnaude, Thomas Barnes.

23 On the back of said indictment appear endorsements in words and figures following, to wit:

United States of America, district of North Dakota. In district court, Dec. term, A. D. 1892. United States of America *vs.* W. W. Allen, Michael Dealy, *et al.* Indictment for conspiring to defraud the U. S. A true bill. D. P. Kuhn, foreman of grand jury. Presented in open court by the foreman of the grand jury in presence of the grand jury and filed as a record of this court this 16th day of Dec., A. D. 1892. J. A. Montgomery, clerk, by H. G. Edwards, deputy. Edgar W. Camp, U. S. attorney.

Thereupon, afterwards, to wit, on the 22d day of December, A. D. 1892, the following proceedings, among others, were had and done in said case, as appear of record on page 71 of the Journal of said court for the northeastern division of said district:

THE UNITED STATES *vs.* WILLIAM W. ALLEN *et al.* } 190.

Come now the United States, by Edgar W. Camp, district attorney, and the defendants, W. W. Allen, Michael Dealy, Edward Laberge, and H. H. Fritz; and said defendants are duly arraigned upon the indictment had against them, charging them with conspiring to defraud the United States, and are granted until tomorrow morning at 10 o'clock to plead to said indictment.

Thereupon, afterwards, to wit, on the 23d day of December, A. D. 1892, a demurrer was filed in said case; which said demurrer is in words and figures following, to wit:

24 UNITED STATES OF AMERICA, } ss:
District of North Dakota, }

U. S. District Court.

THE UNITED STATES
vs.
WILLIAM ALLEN, MICHAEL DALY, EDWARD LABERGE, PETER THIBERT, and H. H. FRITZ, Defendants. } Demurrer.

Comes now the defendants in the above-entitled action, by their attorneys, John Burke and T. T. Tillotson, and demurs to each and every count in the indictment in said action for the reason and upon the ground that the same do not state facts sufficient to constitute a crime against the United States. Defendants further demur specially to counts numbered twelve, thirteen, fourteen, fifteen, sixteen, and seventeen for the reason and upon the ground that the same do not state facts sufficient to constitute a crime against the United States.

JOHN BURKE AND
T. T. TILLOTSON,
Attorneys for Defendants.

Upon the back of said demurrer appear endorsements in words and figures following, to wit:

190. United States of America, district of North Dakota. United States *vs.* W. W. Allen *et al.* Demurrer. Filed Dec. 23d, 1892. J. A. Montgomery, clerk.

Thereupon, afterwards, to wit, on the 23d day of December, 1892, the following, among other, proceedings were had and done, as appear of record on page 74 of the Journal of said court for the northeastern division of said district:

[Endorsed:] Copy of demurrer. U. S. *vs.* Allen, Dealy, *et al.*

25 THE UNITED STATES } 190.
vs.
WM. W. ALLEN *et al.* }

Come now the United States, by Edgar W. Camp, district attorney, and the defendants, Wm. W. Allen, Michael Dealy, Edward Laberge, and H. H. Fritz, with their attorneys, John Burke and T. T. Tillotson, Esqs., and by their attorneys do file a demurrer to the indictment had against them charging them with conspiring to defraud the United States.

Now, after hearing the arguments of the respective counsel upon said demurrer and upon due consideration thereof, it is ordered that said demurrer be, and the same hereby is, overruled; to which ruling the defendants, through their said counsel, duly except.

Now, said defendants being called upon to plead to said indictment each does plead for himself that he is not guilty of the offense therein charged:

26 Thereupon, afterwards, to wit, on the 7th day of January, A. D. 1893, the following proceedings, among others, were had and done in said case, as appear of record on page 88 of the Journal of said court for the northeastern division:

THE UNITED STATES
vs. 190.
WILLIAM W. ALLEN, MICHAEL DEALY, EDWARD LABERGE, PETER THIBERT, and H. H. FRITZ.

* * * * * * *

Now, the district attorney enters a *nolle prosequi* to the second, fourth, fifth, sixth, ninth, and seventeenth counts of the indictment herein.

Thereupon, afterwards, to wit, on the 9th day of January, A. D. 1893, the following proceedings, among others, were had and done in said case, as appear of record on page 89 of the Journal of said court for the northeastern division:

27 THE UNITED STATES
vs.
WILLIAM W. ALLEN, MICHAEL DEALY, EDWARD LABERGE, PETER THIBERT, and H. H. FRITZ.

Now come the jury, and by their foreman, in their presence, the defendants and their counsel being also present in court, do render the following

Verdict.

"We, the jury, find the defendants William W. Allen, Michael Dealy, and Edward Laberge guilty as charged in the first, third, seventh, eighth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth counts of the indictment, and we find the defendant H. H. Fritz not guilty.

(Signed) J. E. LAVAYEA, *Foreman.*

And the jury, after being polled, is discharged from further consideration of the case.

28 Thereupon, afterwards, to wit, on the 14th day of January, 1893, motions in arrest of judgment were filed in said case; which said motions are in words and figures following, to wit:

29 UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, }
District of North Dakota. }

In United States District Court for the District of North Dakota.

THE UNITED STATES OF AMERICA
vs.
WILLIAM W. ALLEN, MICHAEL DAILEY, EDWARD LEBARGE, PETER THIBERT, and H. H. FRITZ.

Motion in Arrest of Judgment.

The defendants above named, William W. Allen, Michael Dailey, now, after verdict against them and each of them and before sentence and by their counsel herein, T. T. Tillotson, John Burke, Bangs & Fisk, A. S. Drake, and John M. Cochrane, move the court to arrest judgment herein and not pronounce the same because of manifest errors in the record appearing and because no judgment against them can be lawfully rendered upon said record, and specify the following:

I.

That the indictment upon which these defendants were tried was fatally defective; that it appears upon the face of said indictment and of each and every count thereof upon which the said verdict of guilty was found by the jury, to wit, the first, third, seventh, eighth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth counts of said indictment, and none of the counts thereof above mentioned state facts sufficient to constitute an offense against the United States.

II.

The first count of said indictment does not state facts sufficient to constitute a crime against the United States.

III.

The object of the alleged conspiracy in the first count of the indictment, as alleged, does not state any crime against the United States.

30 IV.

The United States could not be defrauded of the title or possession of any of its lands by means of fictitious entries.

V.

No act is alleged to have been done in furtherance of or to effect the object of the conspiracy as charged.

VI.

The alleged conspiracy is not criminal, and the acts alleged to have been done in pursuance thereof are not such as would deceive

a person of ordinary prudence or understanding or any government official; hence are not criminal.

VI½.

None of the acts charged as done to effectuate the conspiracy, to wit, to enter under the laws of the United States, in any way promote or can in any way be connected with the conspiracy charged.

VII.

The facts are not alleged with such certainty as to apprise the defendants of the nature of the accusation against them.

VIII.

That the time of the act alleged as having taken place in pursuance of said conspiracy is not set forth, and it does not appear from said charge that any act in pursuance of the conspiracy was done subsequent to the alleged conspiracy.

IX.

That it appears upon the face of the indictment and of count one thereof that the alleged conspiracy was carried into execution and culminated into a felony, and that the conspiracy emerged into a completed felony and is not punishable.

XI.

And to the third count in the indictment contained and upon which the defendants herein are found guilty by the jury, the defendants move in arrest of judgment upon each of the grounds assigned as against count one of the said indictment.

31 XII.

And to the seventh count of the indictment and upon which the defendants herein were found guilty by the jury the defendants move in arrest of judgment upon each of the grounds assigned as against count one of the said indictment.

XIII.

And to the eighth count of the indictment and upon which the defendants herein are found guilty by the jury the defendants move in arrest of judgment on the same grounds assigned as against count one of the said indictment.

XIV.

And to the tenth count of the indictment and upon which the defendants herein were found guilty by the jury the defendants move in arrest of judgment upon each of the grounds assigned as against count one of the said indictment.

XV.

And to the eleventh count of the indictment and upon which the defendants herein were found guilty by the jury the defendants move in arrest of judgment upon each of the grounds assigned as against count one of the said indictments.

XVI.

And to the twelfth count of the indictment and upon which the defendants herein were found guilty by the jury the defendants move in arrest of judgment upon each of the grounds assigned as against count one of the said indictment.

XVII.

And as to the thirteenth count of the indictment and upon which the defendants herein were found guilty by the jury, the defendants move in arrest of judgment upon each of the grounds assigned as against count one of the said indictment.

XVIII.

As to the fourteenth count of the indictment and upon which the defendants herein were found guilty by the jury, the defendants move in arrest of judgment upon each of the grounds assigned as against count one of the indictment.

32 XIX.

And as to the fifteenth count of the indictment and upon which the defendants herein were found guilty by the jury, the defendants move in arrest of judgment upon each of the grounds assigned as against count one of the said indictment.

Dated this 13th day of January, A. D. 1893.

WILLIAM W. ALLEN,
MICHAEL DAILEY,
Defendants.
T. T. TILLOTSON,
JOHN BURKE,
Attorneys for Defendants.

BANGS & FISH,
A. S. DRAKE AND
JOHN M. COCHRANE,
Of Counsel.

33 UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, }
District of North Dakota. }

In United States District Court for the District of North Dakota.

THE UNITED STATES OF AMERICA }
vs.
WILLIAM W. ALLEN, MICHAEL DAILEY, EDWARD LEBARGE, }
PETER THIBERT, and H. H. FRITZ.

Motion in Arrest of Judgment.

The defendants above named, William W. Allen, Michael Dailey, now, after verdict against them and each of them and before sentence and by their counsel herein, T. F. Tillotson, John Burke, Bangs & Fisk, A. S. Drake, and John M. Cochrane, move the court to arrest judgment herein and not pronounce the same because of manifest errors in the record appearing and because no judgment against them can be lawfully rendered upon said record, and specify the following:

I.

That the indictment upon which these defendants were tried was fatally defective; that it appears upon the face of said indictment and of each and every count thereof upon which the said verdict of guilty was found by the jury, to wit, the first, third, seventh, eighth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth counts of said indictment, and none of the counts thereof above mentioned state facts sufficient to constitute an offense against the United States.

II.

The first count of said indictment does not state facts sufficient to constitute a crime against the United States.

III.

The object of the alleged conspiracy in the first count of the indictment, as alleged, does not state any crime against the United States.

34 IV.

The United States could not be defrauded of the title or possession of any of its lands by means of fictitious entries.

V.

No act is alleged to have been done in furtherance of or to effect the object of the conspiracy as charged.

VI.

The alleged conspiracy is not criminal and the acts alleged to have been done in pursuance thereof are not such as would deceive

a person of ordinary prudence or understanding, or any government official; hence are not criminal.

VI½.

None of the acts charged as done to effectuate the conspiracy, to wit, to enter under the laws of the United States, in any way promote or can in any way be connected with the conspiracy charged.

VII.

The facts are not alleged with such certainty as to apprise the defendants of the nature of the accusation against them.

VIII.

That the time of the act alleged as having taken place in pursuance of said conspiracy is not set forth, and it does not appear from said charge that any act in pursuance of the conspiracy was done subsequent to the alleged conspiracy.

XI.

And to the third count in the indictment contained and upon which the defendants herein are found guilty by the jury the defendants move in arrest of judgment upon each of the grounds assigned as against count one of the said indictment.

35

XII.

And to the seventh count of the indictment and upon which the defendants herein were found guilty by the jury the defendants move in arrest of judgment upon each of the grounds assigned as against count one of the said indictment.

XIII.

And to the eighth count of the indictment and upon which the defendants herein are found guilty by the jury the defendants move in arrest of judgment on the same grounds assigned as against count one of the said indictment.

XIV.

And to the tenth count of the indictment and upon which the defendants herein were found guilty by the jury the defendants move in arrest of judgment upon each of the grounds assigned as against count one of the said indictment.

XV.

And to the eleventh count of the indictment and upon which the defendants herein were found guilty by the jury the defendants move in arrest of judgment upon each of the grounds assigned as against count one of the said indictments.

XVI.

And to the twelfth count of the indictment and upon which the defendants herein were found guilty by the jury the defendants move in arrest of judgment upon each of the grounds assigned as against count one of the said indictment.

XVII.

And as to the thirteenth count of the indictment and upon which the defendants herein were found guilty by the jury the defendants move in arrest of judgment upon each of the grounds assigned as against count one *of* the said indictment.

XVIII.

As to the fourteenth count of the indictment and upon which the defendants herein were found guilty by the jury the defendants move in arrest of judgment upon each of the grounds assigned as against count one of the indictment.

36 XIX

And as to the fifteenth count of the indictment and upon which the defendants herein were found guilty by the jury the defendants move in arrest of judgment upon each of the grounds assigned as against count one of the said indictment.

Dated this 13th day of January, A. D. 1893.

WILLIAM W. ALLEN,
MICHAEL DAILEY,
Defendants.

T. T. TILLOTSON,
JOHN BURKE,
Attorneys for Defendants.

BANGS & FISH, A. S. DRAKE, AND
JOHN M. COCHRANE,
Of Counsel.

37 The defendants William W. Allen, Michael Dailey in support of their motion to arrest judgment in this case give the further reasons:

First. That the indictment in this case does not nor does any of its counts state facts sufficient to constitute an offense under the laws of the United States, in that said indictment charges upon its face these defendants with the offense of conspiracy to defraud the Government of the United States of the title an- possession of lands by means of false, feigned, illegal, and fictitious entries of said lands, and that such charge can amount to nothing more than a misdemeanor, and such indictment shows upon its face that such conspiracy was actually executed and the overt acts therein charged actually consum-ated, and that in executing said conspiracy these defendants did procure persons to commit the crime of perjury by making false affidavits before H. H. Fritz, the clerk of the district

court of Rolette county, a court of record, in support of certain entries to the public lands of the United States in said Rolette county, and that said indictment charges upon its face each of these defendants in carrying out said conspiracy with the crime of subornation of perjury, which is punishable under the laws of the United States as a felony, and that said offense of conspiracy had, before the finding of the indictment, ceased and merged into the crime of subornation of perjury.

Second. That count number three of the indictment does not state facts sufficient to constitute an offense under the laws of the United States, in that said count number three charges these defendants upon its face with the offense of conspiracy to defraud the Government of the United States of the title and possession of lands by means of false, feigned, illegal, and fictitious entries of said lands, and that such charge can amount to nothing more than a misdemeanor, and that said count number three shows upon its face that such conspiracy was actually executed and the overt act therein charged actually consum-ated, and *and* that in executing said conspiracy these defendants did induce and *our*suade one Frank Premeau to appear as a witness for one Charles Pattenaude
38 in making final proof under said laws before H. H. Fritz, clerk of the district court of said county of Rolette, a court of record, and as such witness said Frank Premeau did give false testimony in support of the entry of said Patternaude, and that said count number three charges these defendants upon its face in carrying out said conspiracy with the crime of subornation of perjury, an offense punishable under the laws of the United States as a felony, and that said offense of conspiracy had, before the finding of the indictment, ceased and merged into the crime of subornation of perjury so charged.

Third. That count number one of said indictment does not state facts sufficient to constitute an offense under the laws of the United States, in that said count number one charges these defendants upon its face with the offense of conspiracy to defraud the Government of the United States of the title and possession of lands by means of false, illegal, feigned, and fictitious entries of said lands, and that such charge can amount to nothing more than a misdemeanor, and that said count number one shows upon its face that such conspiracy was actually consum-ated, and that in executing said conspiracy these defendants did induce and *per*suade one Charles Patternaude to commit the crime of perjury in making final proof under the laws of the United States for certain lands in said Rolette county by giving false testimony in support of said proof regarding the matter of his settlement, improvement, and residence upon said lands, and that said count number one charges upon its face these defendants in carrying out said conspiracy with the crime of subornation of perjury in including and *per*suading said Patternaude to so testify, an offense punishable under the laws of the United States as a felony, and that said offense of conspiracy had, before the finding of the indictment, ceased and merged into the crime of subornation of perjury so charged.

Fourth. That count number seven of said indictment does not state facts sufficient to constitute a crime under the laws of the United States, in that said count number seven charges these defendants with the crime of conspiracy to defraud the Government of the
39 United States of its title and possession of certain lands by means of false, feigned, illegal, and fictitious entries of said lands, which offense can amount to nothing more than a misdemeanor, and that said — number seven shows upon its face that such conspiracy was actually executed and the overt act in said count charged actually consum-ated, and that in executing said conspiracy these defendants did induce and pursuade one William Farril to commit the crime of perjury by appearing as a witness before one Laberge in behalf of Leo Jannett in making final proof upon said lands and in support of said proof giving false testimony regarding the residence of said Jannett upon said lands, and that said count number seven upon its face charges these defendants with carrying out said conspiracy with the crime of subornation of perjury in inducing and pursuading said Farril to so testify falsely, which offense of subornation of perjury is punishable under the laws of the United States as a felony, and that said offense of conspiracy had, before the finding of the indictment, ceased and merged into the crime of subornation of perjury so charged.

Fifth. That count number eight of said indictment does not state facts sufficient to constitute a crime under the laws of the United States, in that said count number eight charges these defendants with the crime of conspiracy to defraud the Government of the United States of its title and possession of certain lands by means of false, feigned, illegal, and fictitious entries of said lands, which said offense can amount to nothing more than a misdemeanor, and that said count number eight shows upon its face that such conspiracy was actually executed and the overt act in said count actually charged consummated, and that in executing said conspiracy these defendants did induce and pursuade one Gaspaid Jennett to commit the crime of perjury under the laws of the United States by appearing as a witness for one Leo Jennett in making certain final proofs upon said lands under said laws and by giving in support of said proof false testimony regarding the residence of said Leo upon said lands, and that said count number eight charges upon
40 its face these defendants in carrying out said conspiracy with the crime of subornation of perjury in inducing and pursuading one Gaspaid to so testify falsely, which offense of subornation of perjury is punishable under the laws of the United States as a felony, and that said offense of conspiracy had, before the finding of the indictment, ceased and merged into the crime of subornation of perjury so charged.

Sixth. That count number ten of said indictment does not state facts sufficient to constitute a crime under the laws of the United States, in that said count number ten charges these defendants with the crime of conspiracy to defraud the Government of the United States, of its title and possession of certain lands by means of false, feigned, illegal, and fictitious entries of said lands, which offense can

amount to nothing more than a misdemeanor, and that said count number ten shows upon its face that such conspiracy was actually executed and the overt act in said count charged actually consummated, and that in executing said conspiracy these defendants did induce and pursuade one Leo Jennett to commit the crime of perjury in making proof under his entry to said lands and in making said proof to testify falsely regarding his residence, improvements, and settlement upon said lands in support of said proof, and that said count number ten charges upon its face these defendants in carrying out said conspiracy with the crime of subornation of perjury, — is punishable under the laws of the United States as a felony, and that said offense of conspiracy had, before the finding of the indictment, ceased and merged into the crime of subornation of perjury so charged.

Seventh. Count number eleven of said indictment does not state facts sufficient to constitute an offense under the laws of the United States, in that said count number eleven charges these defendants with the crime of conspiracy to defraud the Government of the United States of its title and possession of certain lands by means of false, feigned, illegal, and fictitious entries of said land, which offense can amount to nothing more than a misdemeanor, and that said count number eleven shows upon its face that such conspiracy was actually consummated, and that in executing
41 said conspiracy these defendants did induce and pursuade one Leo Jennett to commit the crime of perjury in making proof under his entry to said lands and in making said proof to testify falsely regarding his settlement, improvements, and residence upon said lands in support of said entry, and that said count number eleven charges upon its face these defendants in carrying out said conspiracy with the crime of subornation of perjury, which crime of subornation of perjury is punishable under the laws of the United States as a felony, and that said offense of conspiracy had, before the finding of the indictment, ceased and merged into the crime of subornation of perjury so charged.

Eighth. That count number twelve of said indictment does not state facts sufficient to constitute a crime under the laws of the United States, in that said count number twelve charges these defendants with the crime of conspiracy to defraud the Government of the United States of its title and possession of certain lands by means of false, feigned, illegal, and fictitious entries of said lands, which offense can amount to nothing more than a misdemeanor, and that said count number twelve shows upon its face that such conspiracy was actually executed and the overt act in said count charged actually consum-ated, and that in executed said conspiracy these defendants did induce and pursuade one John Azure to make entry for and proof upon said lands and did induce and pursuade said Azure to commit the crime of perjury in making said entry and proof by means of said Azure making false testimony as to his settlement, improvement, and residence upon said land in support of said entry, and that said count number twelve charges upon its face these defendants in carrying out said conspiracy with the crime

of subornation of perjury, which crime of subornation of perjury is punishable under the laws of the United States as a felony, and that said offense of conspiracy had, before the finding of said indictment, ceased and merged into the crime of subornation of perjury so charged.

Ninth. That count number thirteen of said indictment does not state sufficient facts to constitute an offonse under the laws
42 of the United States, in that said count number thirteen charges these defendants with the crime of conspiracy to defraud the Government of the United States of its title and possession of certain lands by means of false, feigned, illegal, and fictitious entries of said lands, which offense can amount to nothing more than a misdemeanor, and that said count number thirteen shows upon its face that such conspiracy was actually executed and the overt act in said court charges actually consummated, and that in executing said conspiracy defendant Allen did induce and *pur*suade one John Azure to make entry for and proof in support thereof upon said lands and did induce and *pur*suade said Azure to commit the crime of perjury in making said entry and proof by means of said Azure making false testimony regarding his settlem-nt, improvements, and residence upon said lands in support of said entry, and that said count number thirteen ch*arg*es upon its face these defendants in carrying out said conspiracy with the crime of subornation of perjury in inducing and *pur*suading said Azure to so falsely testify, which crime of subornation of perjury is punishable und*er*d the laws of the United States as a felony, and that said offense of conspiracy had, before the finding of the indictment, ceased and merged into the crime of subornation of perjury so charged.

Tenth. That count number fourteen of said indictment does not state facts sufficient to constitute a crime under the laws of the United States, in that said count number fourteen charges these defendants with the crime of conspiracy to defraud the Government of the United States of its title and possession of certain lands by means of false, feigned, illegal, and fictitious entries of said lands, which offense *an* amount to nothing more than a misdemeanor, and that said count number fourteen shows upon its face that such conspiracy was actually executed and the overt act in said cou*r*t charges actually consummated, and that in executing said conspiracy defendant Dailey did induce and *pur*suade one Alexander Sayer to commit the crime of perjury by giving false testimony regarding his residence, settlement, and improvement upon said lands in support of his entry to said lands, and that said
43 count number fourteen upon its face charges these defendants in carrying out such conspiracy with the crime of subornation of perjury in so *pur*suading and inducing said Alexander Sayer to commit the offense of perjury as aforesaid, which offense of su*bo*noration of perjury is punishable under the laws of the United States as a felony, and that said offense of conspiracy had, before the finsing of the indictment, ceased and merged into the crime of subornation of perjury so charged.

Eleventh. That count number fifteen of said indictment does not state facts sufficient to constitute a crime under the laws of the United States, in that said count number fifteen charges these defendants with the crime of conspiracy to defraud the Government of the United States of its title and possession of certain lands by means of false, feigned, illegal, and fictitious entries of said lands, which offense can amount to nothing more than a misdemeanor, and that said count number fifteen shows upon its face that said conspiracy was actually executed and the overt act in said court charged actually consummated, and that in executing said conspiracy defendant Laberge did pursuade one Alexander Sayer to commit the offense of perjury by giving false testimony regarding his residence, settlement, and improvement upon said lands in support of his entry to said lands, and that said count number fifteen on its face charges these defendants in carrying out such conspiracy with the crime of subornation of perjury in so pursuading and inducing said Alexander Sayer to commit the offense of perjury as aforesaid, which offense of subornation of perjury is punishable under the laws of the United States as a felony, and that said offense of conspiracy had, before the finding of the indictment, ceased and merged into the crime of subornation of perjury so charged.

WILLIAM W. ALLEN,
MICHAEL DAILEY, *Defendants.*
T. T. TILLOTSON AND
JOHN BURKE,
Attorneys for Defendants.

BANGS & FISH,
A. S. DRAKE, AND
J. M. COCHRANE, *Of Counsel.*

44 Upon the back of said motions appear endorsements in words and figures following, to wit:

Original. 190. U. S. district court. United States *vs.* W. W. Allen *et al.* Motion in arrest of judgment. Filed Jan'y 14, 1893. J. A. Montgomery, clerk.

Thereupon, afterwards, to wit, on the 16th day of January, 1893, the following proceedings, among others, were had and done in said case, as appear of record on page 117 of the journal of said court for the northeastern division thereof:

45 THE UNITED STATES
vs. } 190.
WILLIAM W. ALLEN *et al.*

Come now the United States, by W. P. Miller, assistant district attorney, and the defendants William W. Allen and Michael Dealy, and after due consideration it is ordered that the motion for the arrest of judgment be, and the same is hereby, denied.

Now said defendants move the court for a new trial herein, and, after due consideration, it is ordered that said motion be, and the same hereby is, denied.

46 Thereupon, afterwards, to wit, on the 21st day of July, A. D. 1893, the following, among other, proceedings were had and done, as appear of record on page 45 of the journal of said court for the northwestern division of said district:

47 THE UNITED STATES
vs.
WILLIAM W. ALLEN, MICHAEL DEALY, EDWARD LABERGE, PETER THIBERT, and H. H. FRITZ. } 190.

Come now the United States, by Edgar W. Camp, Esq., district attorney, and the defendant Michael Dealy, and the district attorney now moves the court for sentence against said defendant upon his conviction of the crime of conspiring to defraud the United States, and said defendant being now called upon to show cause, if any he has, why sentence should not be pronounced against him upon his conviction as aforesaid, and no cause being shown, and the premises being considered and fully understood by the court—

It is ordered, adjudged, decreed, and sentenced that the said defendant, Michael Dealy, be imprisoned in the South Dakota penitentiary, situate at Sioux Falls, in the State of South Dakota, for the term of one year and one month, commencing at twelve o'clock noon of this day, and that he pay a fine of one thousand dollars, and that he stand committed in said prison until said fine be paid.

48 Thereupon, afterwards, a bill of exceptions was allowed and filed in said case on the 29th day of July, A. D. 1893; which said bill of exceptions is in words and figures following, to wit:

49 THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA,
District Court of North Dakota.

United States District Court, Northeastern Division.

UNITED STATES OF AMERICA
vs.
WILLIAM W. ALLEN, MICHAEL DEALY, EDWARD Leberge, H. H. Fritz, and Peter Thibert, Defendants. } Bill of Exceptions.

Be it remembered that on the trial of the above-entitled action, which was for conspiracy to defraud the United States, and the overt acts therein alleged being subornation of perjury, the defendants, having exhausted three peremptory challenges to the jurors in said case, asked leave to exercise a fourth peremptory, and thereupon challenged a Mr. Crane, then called as a juror. The prosecution objected to the challenge, claiming that the defendants had exhausted their peremptory challenges, as the crime charged was a misdemeanor. The court sustained the objection. The defendants, by their counsel, then and there duly excepted to said ruling.

Exception 2. A witness for the prosecution named Frank Premeau was allowed to testify against the defendants as to a list of lands alleged to have been given by defendant Laberge at the suggestion of Dealy. The said witness testified to the contents of said alleged lists. The defendants, by their attorneys, objected to the question, in regard to said lists, "How many names on that list?" for the reason that it was not the best evidence. It had been shown by the witness that he had made diligent search and inquiry to find the written lists and failed to find *them*. The court overruled the motion; to which ruling defendants, by their attorneys, then and there duly excepted.

Exception 3. The prosecution asked its witness Frederick Swan, on behalf of the Government: State whether you ever had any talk with Dealy concerning your filing on land or proving up on land. The defendants objected to the question as leading. The court overruled the objection; to which ruling the defendants excepted.

Exception 4 stricken out.

50 Exception 5. The prosecution produced witness Iver E. Shelley, register of the U. S. land office at Devil's Lake, who testified that the lands in question were, prior to & at the time of the alleged filings and proofs, subject and open to entry under the homestead laws at Devil's Lake land office.

The defense introduced a witness named Joseph Rolette, who was interpreter to the recent Indian commission appointed by the United States Government in regard to Indian rights in and to said lands, and out of which it was alleged the United States was defrauded by virtue of the conspiracy charged. Said Rolette testified, without objection, that the said Indian commission made an agreement with the Indians by which for a certain stated compensation they, the Indians, were to cede said land to the United States. He also testified that all of said lands are a part of the lands the said commission decided belonged to the Indians. The testimony shows that patents have been issued for several tracts of the said lands by virtue of final proofs therefor under the homestead laws. The said testimony of said Rolette was not otherwise disputed. The defendants, by their counsel, moved to dismiss the case on the grounds that the particular lands out of which the United States at the time of the alleged — was alleged to have been defrauded and in regard to which the said conspiracy is alleged did not belong to the United States. The court overruled the motion; to which ruling the defendants then and there, by their counsel, duly excepted.

Exception 6. Stricken out.

Exception 7. At the close of the testimony the defendants moved to dismiss the action for the reason that the Government had failed to establish a case against the defendants. The court overruled the motion; to which ruling the defendants, by their counsel, then and there duly excepted.

Exception 8. The defendants, by their counsel, moved for a new trial of said case on the grounds that the testimony was insufficient and for other reasons. The court denied the said motion; to which ruling defendants, by their counsel, then and there duly excepted.

Exception 9. The defendants moved in arrest of judgment for the reason that the said indictment does not state facts sufficient to constitute an offense of crime against the United States or against the laws thereof. The court denied said motion. The defendants to said ruling then and there duly excepted.

Exception 10. The defendants, by their counsel, before pleading to said indictment demurred to the same and to each and every count thereof on the ground and for the reason that the same do not state facts sufficient to constitute a crime against the United States; which demurrer was overruled; to which ruling the defendants, by their counsel, then and there duly excepted.

Dated at Fargo, N. D., July 29, 1893.

M. H. BRENNAN,
Devil's Lake, N. D., of Counsel for Defendant Dealy.

The foregoing exceptions, one to ten, inclusive, except No. 4 & No. 6 stricken out, were this 29th day of July, 1893, duly served on me by M. H. Brennan, of counsel for defendant Dealy, statutory notice of settling same being waived, and I hereby consent to the allowance of the same by the district judge of the United States court for the district of North Dakota, before whom said action was tried.

EDGAR W. CAMP,
United States District Attorney for the District of North Dakota.

And because the foregoing matters do not appear of record in said action the judge of said court who tried this action, finding the same to be true and correct, has signed and sealed this bill of exceptions and ordered the same to be made; and the same is hereby made, a part of the record in said action.

Signed and sealed this 29th day of July, 1893.

ALFRED D. THOMAS, *Judge.*

On the back of said bill of exceptions appear endorsements in words and figures following, to wit:

United States district court, district of North Dakota. United States *vs.* Michael Dealy *et al.* Bill of exceptions. Filed Jul- 29, 1893. J. A. Montgomery, clerk, by H. G. Edwards, deputy.

Thereupon, afterwards, to wit, on the 29th day of July, A. D. 1893, an assignment of errors and a petition for writ of error were filed in said case, of which said assignment of errors and petition for writ of error the following are the originals:

In the Supreme Court of the United States.

Petition for a writ of error from the Supreme Court of the United States to the district court of the United States for the district of North Dakota in the case of The United States *vs.* Michael Dealy and others, for conspiracy to defraud the United States.

To the honorable the Supreme Court of the United States:

The petition of Michael Dealy respectfully shows to this honorable court as follows:

That on December 6, 1892, he, your petitioner, was indicted by a United States grand jury impaneled in the district court of the United States for the State of North Dakota, in the northeastern division of said district, pending a session of said court then holden at the city of Grand Forks, in said State and subdivision, and that the charge in said indictment was "conspiracy to defraud the United States" alleged to have been committed by your petitioner and one William W. Allen, one Edward Laberge, one H. H. Fritz, and one Peter Thibert, at the county of Rolette, in said State, on the first day of April, 1891.

That under said indictment, so found, the following proceedings were had:

The defendants, including your petitioner, were duly arraigned before said court at said session on December 28, 1892, and by their attorneys, T. T. Tillotson and John Burke, demurred to said indictment and to each and every count thereof by filing in said court, in writing, a demurrer to said indictment and to each and every count thereof; which said demurrer alleged as ground therefor that the said indictment does not state facts sufficient to constitute a crime against the United States, and that no count thereof states facts sufficient to constitute a crime against the United States; which demurrer was argued before said court and the same was overruled and the defendants duly excepted to such ruling; that thereafter, to wit, on the 28th day of December, 1892, the said defendants, including your petitioner, were placed upon their trial for the charge in said indictment contained and tried by a jury at the city of Grand Forks aforesaid, in said district, and the jury in said case returned the following verdict which your petitioner says is void and of no force or validity for the reason that it is not entitled in any court and for other reasons, as will more fully hereinafter appear in an assignment of errors in this case.

Verdict.

54 "THE UNITED STATES OF AMERICA
vs.
WILLIAM W. ALLEN, MICHAEL DEALY, EDWARD LE BERGE, PETER THIBERT, and H. H. FRITZ, Defendants.

We, the jury, find the defendants William W. Allen, Michael Dealy, and Edward Le Berge guilty as charged in the first, third, seventh, eighth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth counts of the indictment, and we find the defendant H. H. Fritz not guilty.

J. E. LAVAYEA, *Foreman.*"

To which verdict the defendants then and there duly excepted.

That after the trial of said cause and before the submission thereof to the jury the defendants, including your petitioner, by their attorneys as aforesaid, moved the said court to direct a verdict of not guilty for the reasons that the prosecution had failed to establish by competent testimony or by any testimony whatever the

identity of the land out of which the Government was alleged to have been defrauded.

Also for the reason that the evidence did not show a concerted action between the said defendants to defraud the Government out of lands as alleged in the indictment.

Also that the evidence did not show that said defendants had any knowledge whatever that the claimants to said lands had not complied with the land laws relative to their respective claims; which said motion was overruled; to which ruling the defendants duly excepted; which exception was granted.

That afterwards a motion for a new trial was made in said action, which motion was based on the grounds hereinbefore alleged against the validity of said indictments and for the reasons stated in the motion to direct a verdict, and also for the reason that the verdict is unsupported by the evidence, and that the prosecution had not proved a conspiracy between said defendant or any of them and your petitioner; which motion for new trial was also based on errors at law occurring at trial and duly excepted to by defendants; that the said court denied said motion for new trial; that the defendants duly excepted to the ruling denying said motion for new trial, which exception was granted.

That afterwards and before final judgment and sentence in said action your petitioner made a motion before said court in arrest of judgment on said charge and verdict, setting up the grounds hereinbefore alleged and other grounds stated in said motion, and which will more fully appear in a bill of exceptions hereto attached; which motion in arrest of judgment was denied by said court, and the court's ruling therein was duly excepted to.

55 That thereafter, on July 21, 1893, at a session of said court, holden at Devil's Lake, in the northwestern division of said district, Hon. Judge Thomas, presiding, your petitioner was brought before said court, and final judgment was thereupon on said date rendered in said cause, and the sentence of the court was that your petitioner be imprisoned in the penitentiary of Sioux Falls, in South Dakota, for the term of one year and one month and pay a fine of one thousand dollars and stand committed till such fine be paid, all of which will appear from a certified copy of the record hereto annexed.

That your petitioner feels aggrieved at said rulings, judgment, and sentence, and says there is manifest error and injustice therein for the reasons alleged in the assignment of errors hereto annexed and hereinafter set forth, and he prays for a writ of error from the honorable Supreme Court of the United States, directed to the said district court for the State of North Dakota, commanding it to send up the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the said writ to be so issued, so that the same may be in Washington at the next term to be held of said court.

Your petitioner also prays that a supersedeas be granted in said cause and the said district court be ordered *et* to admit your peti-

tioner to bail in such sum as the circumstances of the case may warrant; and he will ever pray, &c.

M. H. BRENNAN,
Of Counsel for Defendant Michael Dealy, Petitioner.

STATE OF NORTH DAKOTA, }
County of Cass, } *ss:*

M. H. Brennan, being duly sworn, deposes and says: I am of counsel for the above-named petitioner, Michael Dealy. I have read the foregoing petition for writ of error, and the statements therein made are true to my best knowledge and belief.

M. H. BRENNAN.

Subscribed and sworn to before me this 29th day of July, 1893.

[Seal of United States District Court, North Dakota.]

H. G. EDWARDS,
Deputy Clerk of U. S. Dist. Court,
By —— ——, *Deputy.*

56 The Supreme Court of the United States.

In the Matter of Petition of MICHAEL DEALY for Writ of Error to District Court for the District of North Dakota.

Assignment of Errors.

Afterwards, to wit, on the 28th day of July, 1893, at the July term of said court for said year, holden at Devil's Lake and Fargo, in said State, comes the said Michael Dealy, by his attorney, M. H. Brennan, and says that in the record and proceedings in the above-entitled matter and cause there is manifest error in this, to wit:

1. That the matter charged in the said indictment against the defendant Michael Dealy and others does not constitute a crime at common law or under any statute of the United States; that no count of said indictment states facts sufficient to constitu-e a crime or offense against the laws of the United States.

2. That it appears on the face of said indictment and upon each and every count therein that the crime charged, to wit, conspiracy to defraud the United States, being a misdemeanor, is merged in a higher crime alleged in said indictment as committed by said defendant, to wit, the crime of subornation of perjury.

3. That the evidence given in support of said indictment does not constitu-e a crime against the United States.

4. That the evidence does not show a conspiracy between said Dealy and said Allen or between said Dealy and any of the other defendants.

5. That it does not appear from said indictment or from any count thereof that said district court had jurisdiction of the alleged crime charged in said indictment or in any count thereof, it not appearing therefrom that the lands in regard to which said alleged

conspiracy was formed are situated within the jurisdiction of said district court.

6. The said district court erred in denying the motion in arrest of judgment in said case.

7. The said court erred in denying the motion for new trial in said action.

8. The court erred in rendering judgment in said acti-n, the said indictment not stating facts sufficient to constitute a crime against the United States or under the laws thereof.

Wherefore the defendant Dealy prays that said judgment be reversed and he be discharged and his bail exonerated.

M. H. BRENNAN,
Attorney for Plaintiff in Error, Devil's Lake, N. D.

57 [Endorsed:] In Supreme Court of the United States. United States dist. court, district of North Dakota. Michael Dealy, plaintiff in error, *vs.* United States, respondent. Petition for writ of error. Filed Jul- 29, 1893. J. A. Montgomery, clerk, by H. G. Edwards, deputy. M. H. Brennan, att'y for pl't'ff in error.

IN CHAMBERS, *Aug. 3d*, 1893.

Let the writ of error issue as prayed and be made a supersedeas on plaintiff in error giving bond with sureties in the penal sum of five hundred dollars, conditioned according to law & approved by the judge of the district court of the United States for the district of North Dakota.

Application for admission to bail may be made to said district judge.

MELVILLE W. FULLER,
Chief Justice of the United States.

Endorsed on cover: Case No. 15,419. North Dakota D. C. U. S. Term No., 1035. Michael Dealy, plaintiff in error, *vs.* The United States. Filed October 9th, 1893.

Office Supreme Court U. S
FILED.
MAR 19 1894
JAMES H. McKENNEY,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1893

MICHAEL DEALY, *Plaintiff in Error.*
vs. No. 1035
THE UNITED STATES.

In Error to the District Court of the United States for the District of North Dakota

BRIEF FOR PLAINTIFF IN ERROR.

A. S. BLAKE,
Of Counsel for Plaintiff in Error.

Walker Brothers, Law Blank Publishers, Fargo, N. D.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1893.

MICHAEL DEALY, *Plaintiff in Error*,
vs.
THE UNITED STATES.

No. 1035.
R. S. 5440.

In Error to the District Court of the United States for the District of North Dakota.

Brief for Plaintiff in Error.

STATEMENT.

The plaintiff in error, Michael Dealy, and his co-defendants, William W. Allen and Edward Laberge, were convicted of conspiracy to defraud the United States. They were indicted and tried jointly with Peter Thibert and H. H. Fritz under an indictment containing fifteen

counts, the charging part of the last fourteen counts being identically the same, word for word, the only variation between the counts being in the overt acts set out. Plaintiff was sentenced July 21st, 1893, to pay a fine of $1000 and be imprisoned in the penitentiary at Sioux Falls, South Dakota, for the period of thirteen months.

The charging part of the first count of the indictment is as follows:

"That on the first day of April, 1891, at the County of Rolette, State of North Dakota, and within the jurisdiction of this court, one William W. Allen, one Michael Dealy, one Edward Laberge, one Peter Thibert and one H. H. Fritz and others, to the Grand Jury unknown, did commit the crime of conspiracy to defraud the United States, committed as follows:

That at the time and place aforesaid, the said William W. Allen, Michael Dealy, Edward Laberge, Peter Thibert and H. H. Fritz, and others to the jury unknown, did falsely, unlawfully and wickedly conspire, combine, confederate, and agree together among themselves, to defraud the United States of the title and possession of large tracts of land in said county, of great value, by means of false, feigned, illegal, and fictitious entries of said lands under the homestead laws of the United States, the said lands being then and there public lands of the United States open to entry under said homestead laws at the local Land Office of the United States, at Devils Lake city, in said state."

The charging part of the remainder of the counts is in each as follows:

"And the grand jurors aforesaid, upon their oaths "aforesaid, do further find and present, that at the time "and place aforesaid, said William W. Allen, said Michael "Dealy, said Edward Laberge, said Peter Thibert, H. H. "Fritz, and others to the jury unknown, falsely, unlaw-

" fully and wickedly, did conspire, combine, confederate " and agree, among themselves, to defraud the United " States of the title and possession of certain lands in said " county, being public lands of the United States of great " value, open to entry at the local land office of the United " States, at Devils Lake city, in said state, by means of " false, feigned, illegal and fictitious entries of said lands " under said homestead laws."

The allegations of overt acts of the various counts follow three forms; those of counts three, eleven and thirteen being samples of them all.

The overt act set out in the third count is as follows:

" And that according to and in pursuance of said con- " spiracy combination, confederation and agreement, the " said Allen did fraudulently and unlawfully induce and " persuade one Frank Premeau to appear as a witness " for one Charles Pattnaude in making final proof under " said laws before H. H. Fritz, Clerk of the District Court " of the State of North Dakota in and for said county, " being a court of record of said state and as such witness " before said Fritz to testify and make proof for said " Pattnaude in effect that he had resided for more than " five years immediately preceding the time of making " said proof on the lands known and described as: South " half of the Nostheast quarter and lots one and two of " section 6 in Towaship 163 North of Range 70, West " of the Fifth Principal Meridian, lying and being in said " county, public lands of the United States and subject " to entry under said laws at said land office; whereas in " fact said Pattnaude, as said Allen well knew, had never " resided on said land at any time within five years prior " to making said proof."

The overt act set out in the eleventh count is as fol- owls:

"And that according to and in pursuance of said "conspiracy, combination, confederacy and agreement "among themselves had as aforesaid, the said Allen did "persuade and induce one Leo Jennett to make filing "under said homestead laws and thereafter to make "proof and final entry under said laws for the lands "known and described as follows: Northwest quarter of "section 8 in Township 163 North of Range 70, West of "the Fifth Principal Meridian, said lands lying and being "in said county, on which lands said Jennett, as said "Allen then and there well knew, had never made set-"tlement, improvement or residence."

The overt act set out in the 9" ~~thirteenth~~ count is as follows:

"And that according to and in pursuance of "said conspiracy, combination, confederacy and agree-"ment among themselves had as aforesaid the said Allen "did persuade and induce one John Azure to make filing "under said homestead laws for the lands known and de-"scribed as follows: Southwest quarter of section 8 in "Township 163, North of Range 70, West of the Fifth "Principal Meridian, said lands lying and being in said "county, on which said lands said Azure, as said Allen "then and there well knew, had never made settlement, "improvement or residence."

Plaintiff in error interposed a general demurrer to the indictment and each count thereof, which demurrer alleges as grounds thereof, that said indictment does not state facts sufficient to constitute a crime against the United States; and that no count thereof states facts sufficient to constitute a crime against the United States.

Which demurrer the court by its order overruled, and to which ruling and order plaintiff in error duly excepted, and which ruling and order are assigned as error.

Verdict of guilty on counts 1, 3, 7, 8, 10, 11, 12, 13, 14, 15.

ASSIGNMENT OF ERRORS

1. The court erred in overruling the general demurrer of plaintiff in error.

2. The court erred in overruling the motion of plaintiff in error to direct a verdict in his behalf.

3. The court erred in overruling the motion of plaintiff in error for a new trial.

4. The court erred in overruling the motion of plaintiff in error in arrest of judgment.

ARGUMENT.

The record shows that plaintiff in error stands acquitted by the jury of the offense charged against him in this indictment.

The indictment charges plaintiff in error with the same identical conspiracy ~~fifteen~~ 17 different times in the same identical words without variation.

Stripped of its verbiage the indictment amounts to but one count and one charge of conspiracy, with ~~fifteen~~ 17 different overt acts; but the pleader has not so stated it: he has described the same identical conspiracy ~~fifteen~~ 17 separate and distinct times—each time with an overt act appended—and called them counts:

The record shows that plaintiff in error was acquitted ~~five~~ 7 times of this conspiracy and convicted ten times of the same identical conspiracy; an anamoly of which the annals of criminal jurisprudence furnishes no precedent.

That the acquittal of plaintiff in error ~~five~~ 7 times of the very offense charged acquits him of the entire ~~fifteen~~ 17 charges is mathematical law—axiomatic—it proves itself.

This court should for this reason alone discharge the plaintiff in error without further argument.

Conspiracy being a continuing offense but one conviction or acquittal is permissible
ex parte Snow
120 US 274

A faulty charge of conspiracy under section 5440, Revised Statutes, cannot be aided or helped out by the allegations of the overt act or acts.

Pettibone v. *United States*, 148, U. S., 197.
United States v. *Britton*, 108 U. S., 199.
White v. *Queen*, 15 Moak's Rep., 356.
2 Wharton Precedents and Pleas, 607.

Chief Justice Fuller in the Pettibone case, said on this point. "*The conspiracy must be sufficiently charged* "*and cannot be aided by averments of acts done by one* "*or more of the conspirators in furtherance of the con-* "*spiracy.*"

The glaring defect in the charging part of each count is that there is no identification or attempted identification of any lands as the object of the alleged conspiracy, notwithstanding the pleader had in mind particular lands and describes them as, "*certain lands in said county* "*being public lands of the United States of great value,* "*open to entry at the local land office.*" What lands he meant is left for plaintiff to guess at and grope amidst all the lands in Rolette county, and left to prepare his defense for some four thousand quarter sections of land in that county. There is no assertion that the pleader did not know the identity of the land or could not ascertain it.

It will not suffice to charge an offense in the general words of the statute. "*It must be accompanied with* "*such a statement of the facts and circumstances as will* "*inform the accused of the specific offense* coming under " the general description with which he is charged."

United States v. *Hess*, 124 U. S., 483.

"All the circumstances constituting the offense must " be specially set forth."

United States v. *Cruikshank*, 92 U. S., 563.

A charge of conspiracy "to defraud the United "States of the title and possession of certain lands in "said county," is indefinite and does not comply with the elementary rules of pleading in criminal cases, and does not inform the plaintiff in error of the charge with sufficient certainty to enable him to prepare a defense.

United States v. *Cruikshank*, 92 U. S., 563.
United States v. *Hess*, 124 U. S., 483.
United States v. *Simmonds*, 96 U. S., 360.
United States v. *Carll*, 105 U. S., 611.
United States v. *Britton*, 107 U. S., 655.
In re Greene, 52 Fed, 111.
In re Benson, 58 Fed., 970.
United States v. *Walsh*, 5 Dillon, 58.
United States v. *Staton*, 2 Flippin, 319.
United States v. *Goggin*, 9 Bissell, 269.
Rex v. *Fowle*, 4 C. & P., 592.
2 Wharton's Precedents, 607.

Could anything be more indefinite or uncertain? The pleader did not have in mind in drafting the charge in the first count the land described in the overt act of that count because the land described in the third count fits the charge in the first count as well as it does the charge in the third count, and *vice versa*. Each count reiterates the same charge of conspiracy. Stripped of its verbiage the indictment really amounts to but one count with ~~fif~~ ~~teen~~ overt acts set out, but the pleader does not so state it, but attempts to charge ~~fifteen~~ separate and distinct conspiracies. From this labyrinth of bewildering entanglements the plaintiff in error is asked to ascertain what land is meant to be the groundwork of the charge in each count.

On this point of failure to describe land in the charging part of the counts, the case of *United States* v. *Walsh*.

(5 Dilion 58) is instructive. That was a case under the same section of the Statute 5440, and charged defendants with conspiracy in "certifying that certain false and "fraudulent accounts, and vouchers for material furn "ished for use in the construction of the said custom "house and post office, and for labor performed on said "building were true and correct." The learned Judge Dillon, commenting on that language, said:

"What can be more general and indefinite than this? "It is not alleged that the conspiracy was to certify falsely "all accounts and vouchers for material and labor for the "building, but to certify 'that certain false accounts and "vouchers for material and labor were true and correct.' "This is all. But what accounts and what vouchers is not "alleged. How does this advise the defendant so as to "enable him to make his defense; what accounts and what "vouchers are to be impeached? How can the court "know, if a trial is gone into under this indictment, "whether the accounts and vouchers offered in evidence "by the government are the same ones in respect to which "the grand jury found the bill of indictment? *Lambert* "v. *People*, 9 Cow. 578. If the defendants are convicted "or acquitted on an indictment so general and uncertain, "how can they plead the judgment in bar of another "prosecution? How does it appear that the accounts and "vouchers were such as that an 'intent' to defraud the "United States can be predicated of them? No dates, "sums, amounts, persons or materials are mentioned, and "it does not appear this could not be done, for the allega "tion is that the conspiracy related to 'certain false and "fraudulent accounts.' We agree with the supreme court "of Pennsylvania in the case cited, that 'precision in the "description of the offense is of the last importance to "the innocent, and hence the importance of the decision "of the United States Supreme Court in the Cruikshank "case, which settles the law for all the courts of the "United States.'"

In the celebrated Cruikshank case the eighth and

sixteenth counts charged in the following language—to hinder and prevent them "in their several and respective "free exercise and enjoyment of every, each and all and "singular the several rights and privileges granted and "secured to them by the constitution and laws of the "United States." Chief Justice Waite said in this case:

"So here, the crime is made to consist in the unlawful "combination with an intent to prevent the enjoyment "of any right granted or secured by the constitution, "etc. All rights are not so granted or secured. Whether "one is so or not is a question of law, to be decided by "the court, not the prosecutor. Therefore, the indict-"ment should state the particulars, to inform the court "as well as the accused. It must be made to appear—"that is to say, appear from the indictment, without "going further—that the acts charged will, if proved, "support a conviction for the offense alleged. But it is "needless to pursue the argument further. The conclu-"sion is irresistible that these counts are too vague and "general. They lack the certainty and precision required "by the established rules of criminal pleading. It fol-"lows that they are not good and sufficient in law. They "are so defective that no judgment of conviction should "be pronounced upon them."

In the *White* v. *Queen*, case, 15 Moak, 356, the learned chief justice quotes Tindal, C. J., as observing:

"The more important objection was that the indict-"ment itself was bad and we are all, upon consider-"ation, of opinion that this objection must prevail. Mr. "Pashley, for plaintiffs in error, argued that the indict-"ment was bad, because it contains a defective state-"ment of the charge of conspiracy, and we agree that it "is defective. The charge is that the defendants below "conspired to cheat and defraud divers liege subjects, "being tradesmen of their goods, etc.: and the objection "is that these persons should have been designated by

" their christian names and surnames or an excuse given,
" such as that their names are to the jury unknown,
" because this allegation imports that the intention of
" the conspirators was to cheat certain definite indiv-
" iduals who must always be described by name, or a
" reason given why they are not: and if the conspiracy
" was to cheat indefinite individuals, as for instance
" those whom they should afterwards deal with, or after-
" wards fix upon, it ought to have been described in
" appropriate terms, showing that the objects of the
" conspiracy were, at the time of making it, unascer-
" tained, as was in fact done in the cases of *Rex* v.
" *DeBerenger*, 3 M. & S., 67, and *Rex* v. *Peck*, 9 A. & E. 986."

Nor can the pleader escape the necessity of describing the land.

" The reason given for not having set out the circum-
" stances of the offense that it was impossible because
" they could not be known, is untenable because the
" grand jury could find no bill without proof of such facts,
" and they must be within the knowledge of the prosecut-
" ing officer before he can conclude that such offense
" has been committed "

United States v. *Beltilini*, 1 Woods, 654.
White v. *Queen*, 15 Moak's Eng. Rep., 356.
S. C., 13 Cox C. C., 318.

As was well said by Whiteside C.J., in *White* v. *Queen*, at p. 358 (a copy of indictment will be found in the opinion of Fitzgerald):

" The attorney general defined the nature of the
" case as a conspiracy: and he argued that when the
" persons defrauded were unascertained, but were to be
" found out afterwards they need not be as they could
" not, named in the indictment. But I think there was
" a fallacy in his argument. When are the persons to be
" ascertained? If they were ascertained at the time of
" sending up the indictment and they were not then
" sent up, the case falls within the authority of *Rex* v.
" *DeBerenger*, 3 M. & S., 67."

For further authorities on the point that the land should be described, see:

Washburn Criminal Law, 146.
1 Chitty C. Law, 174–227–228.
1 Archibald C. Pleas, 85–86.
Com. v. *Tuck*, 20 Pick, 362.
Stratton v. *Com.*, 10 Met., 220.
3 Greenleaf Evidence, 95.
2 Russell on Crimes, 694 2nd note (n).
Wright on Conspiracy, 194–219.
Com. v. *Nickerson*, 8 S. & R., 420.
Wharton's Precedents, 339.

The charge, if anything, is to accomplish a fraud by means of "*false, feigned, illegal and fictitious* entries."

Passing for the moment any discussion of the doctrine of the means, let me say that that which is "false, "feigned, illegal and fictitious" is equivalent to stating it to be a forgery.

Webster defines the word false to mean: First—Uttering falsehood. Second—Likely to deceive. Third—Not genuine, counterfeit, hypocritical. Fourth—Erroneous.

Charging a thing to be false is equal to saying that it is: First—False in contents. Second—False in execution.

To describe an instrument as being false does not specify whether it is false in contents or false in execution.

Judge Clark, in *United States* v. *Corbin*, 11 Fed., 238, in a case where defendant was indicted under section 5497, Revised Statutes, for sending a false writing and affidavit to the pension office, says:

"The indictment alleges the sending of a false "writing and affidavit to the pension office. Now an "affidavit may be false in its making, it may be forged, "or it may be false in its statements. This indictment

"alleges that it was false and untrue, and that the state-
"ments in it were untrue and false; an allegation broad
"enough to include a false and forged instrument, and
"one false in its statements but genuine in its execution,
"without specifying which. It may apply to either of
"the two offenses, or both, but does not specify which."

Now a forged entry or a patent obtained by means of forgery cannot bind the United States.

1 Archibald C. Pl., 90, 92.
Moffat v. *United States*, 112 U. S., 24.

Floyd's Acceptances, 7 Wall, 667.
Marsh v. *Fulton Co.*, 10 Wall, 683.

That the use of the words "false, feigned and ficti-
"titious" admits of the interpretation of forgery, see the analogy used by congress in wording the following sections of the Revised Statutes:

Sections 5418, 5419, 5421, 5422, 5425, 5438.

See also:

United States v. *Howell*, 11 Wall., 432.
United States v. *Patterson*, 55 Fed., 640.
7 Am. and Eng. Ency. of Law, 661, note 2.
Franklin Ins. Co. v. *Culver*, 6 Ind., 137.

As has been seen, the use of the word "false" makes the indictment indefinite and leaves the plaintiff in error in doubt as to whether the charge be one of conspiracy to use forged, or one of conspiracy to use perjured, filings or proofs.

The word entry means either: 1. The original homestead filing, or: (2.) Original settlement on the land.

Pat Lynch, 7 Land. Dec. 33.
N. P. Ry. Co. v. *Roberts*, 10 L. D. 427.

H. W. Lord, 11 L. D. 20.
J. W. Johnson, 11 L. D. 527.
W. J. Ernest, 14 L. D. 268.
J. W. Farrel, 13 L. D. 713.

So that the plaintiff has to choose between the following meanings for the words "false, feigned, illegal and "fictitious entries": 1. Forged filings. 2. Forged settlements. 3. Filings untrue in statements. 4. Settlement untrue in fact. 5. Pretended or sham settlement. 6. Pretended or sham filings. 7. Filings in name of fictitious persons. 8. Unreal settlements. 9. Filings which are genuine as to signature of claimants but forged official signatures, and whose statements are true. 10. Filings which are forgeries as to signatures of claimants but genuine official signatures, and whose statements are true. 11. Filings which are genuine as to signatures of claimants but whose official signatures are forgeries, and whose statements are untrue. 12. Filings which are forgeries as to signatures of claimants but whose official signatures are genuine and whose statements are untrue.

Striking out No. 3 (forged settlements) as unthinkable, there remains nearly a dozen distinct interpretations to the allegations of the charging part of each count, and it is impossible to know or guess which is meant to be charged.

Said Lord Ellenborough, in *Rex* v. *Mason*, 2 Taunton, 581, "The convenience of mankind demands, and in "furtherance of that convenience it is part of the duty "of those who administer justice, to require that the "charge should be specific, in order to give notice to the "party of what he is to come prepared to defend, and to "prevent his being distracted amidst the confusion of "a multifarious and complicated transaction, parts of "which only are meant to be impeached as false."

In passing let me point out minor fatalities in the indictment, which time will not permit dwelling upon at length:

First: The land is mentioned as "being public lands of the United States, etc." Now "being" refers to the date of the indictment unless qualified so as necessarily referring to some other time:

2 Am. & Eng. Ency. Law, 158.
1 Bishop C. Proc., 410.
1 Chitty C. Law, 220.
Wharton's C. Law, 75.
Wharton's C. P. & P., 132.
Reg. v. *Silversides*, 3 Q. B., 405.

and "public land" is land upon which no filing has been made.

Sturr v. *Beck*, 133, U. S., 541.
H. & D. Ry. Co. v. *Whitney*, 132, U. S., 357.
Newhall v. *Sanger*, 92 U. S., 761.
Leavenworth v. *U. S.*, 92 U. S., 733.
Witherspoon v. *Duncan*, 4 Wallace, 210-220.
United States v. *Turner*, 54 Fed., 229.
N. P. Ry. Co. v. *Hinchman*, 53 Fed., 526.

The word "entries" as used in the indictment means original homestead filings and is limited to that meaning: See

Sec. 2290, Revised Statutes, as amended by act, March 3, 1891, 26 St. Large, 1095.
Sturr v. *Beck*, 133 U. S., 541.
H. & D. Ry. Co. v. *Whitney*, 132 U. S., 357.

The Federal Courts have used the word "entry" in reference to the public land system in the following cases, and each time with exactly the same meaning and definition—in cash purchase and pre-emption cases as meaning the final proof or final purchase, and in homestead cases as meaning the preliminary filing.

Matthews v. *Zane*, 7 Wheaton, 199.
Chotard v. *Pope*, 12 Wheaton, 588.
Wilcox v. *Jackson*, 13 Peters, 498.
Carroll v. *Safford*, 3 Howard, 441.
Lytle v. *Arkansas*, 9 Howard, 333.
Marks v. *Dickson*, 20 Howard, 501.
Witherspoon v. *Duncan*, 4 Wallace, 210-220.
Frisbee v. *Whitney*, 9 Wallace, 187.
Myers v. *Croft*, 13 Wallace, 291.
Yosemite Valley Case, 15 Wallace, 77.
Eldred v. *Sexton*, 19 Wallace, 189.
United States v. *Waddell*, 112 U. S., 76.
Kans. P. Ry. Co. v. *Dunmeyer*, 113 U. S., 629.
Walden v. *Knerals*, 114 U. S., 373.
H. & D. Ry. Co. v. *Whitney*, 132 U. S., 357.
Starr v. *Beck*, 133 U. S., 541.
S. C. & I. T. Co. v. *Griffey*, 143 U. S., 32.
Logan v. *United States*, 144 U. S., 263.
Barden v. *R. R. Co.*, 145 U. S., 535.
Brenier v. *Brenier*, 147 U. S., 242.
Hamlin v. *Western Land Co.*, 147 U. S., 531.
United States v. *S P. Ry. Co.*, 146 U. S., 570.
Smith v. *Townsend*, 148 U. S., 490.
United States v. *Thompson*, 29 Fed., 86.
United States v. *Ball*, 31 Fed., 667.
United States v. *Freyberg*, 32 Fed., 195.
Denney v. *Dobson*, 32 Fed., 899.
N. P. Ry. Co. v. *Sanders*, 46 Fed., 239.
Same Case, 47 Fed., 606.
N. P. Ry. Co. v. *Hinchman*, 53 Fed., 526.
United States v. *Turner*, 54 Fed., 228.
United States v. *Singleton*, 54 Fed., 448.

In addition to the above the Department of the Interior and the Attorney General have insisted on the same meaning to the word "entry" in homestead cases: i. e., the original filing.

Phelps v. *N. P. Ry. Co.*, 1 L. Dec., 384.
Opinion, Attorney General, 1 Copp. L. O., 388.
Ry. Co. v. *Leech*, 3 L. Dec., 506.
Ry. Co. v. *Whitehall*, 4 L. Dec., 249.

J. C. Mounger, 9 L. Dec., 294.
Pat Lynch, 7 L. Dec., 33.
N. P. Ry. v. *Roberts*, 10 L. Dec., 427.
Henry Elmore, 10 L. Dec., 400.
H. W. Lord, 11 L. Dec., 20.
J. W. Johnson, 11 L. Dec., 527.
J. W. Farrell, 13, L. Dec., 713.
Henry Milne, 14 L. Dec., 242.
W. J. Ernest, 14 L. Dec., 268.
Walker v. *Snyder*, 16 L. Dec., 524.
Thomas v. *St. J. Ry.* 2 Copp., L. O., 869.
White v. *H. & D. Ry. Co.*, 2 Copp., L. O., 876.
Dalton v. *S. M. Ry. Co.*, 2 Copp L. O., 861.
Barbeau v. *S. P. Ry. Co.* 9 Copp., L. O., 81.
Graham v. *H. & D. Ry. Co.*, 9 Copp., L. O., 236.
Whitney v. *Maxwell*, 10 Copp., L. O., 104.
St. P. M. & M. Ry. Co. v. *Rouse*, 10 Copp., L. O., 215.
H. & D. Ry. Co. v. *United States*, 11 Copp., L. O., 172.
S. M. & C. v *Gallispeau*, 11 Copp., L. O., 264.
St. P. M. & M. Ry. Co. v. *Forseth*, 12 Copp., L. O., 39.
United States v. *N. P. Ry. Co.*, 12 Copp., L. O., 161.
Murphy v. *Howe*, 12 Copp., L. O., 168.
C. R. & I. Ry. Co. v. *Easton*, 12 Copp., L. O., 259.
Hamilton v. *N. P. Ry. Co.*, 12 Copp., L. O., 277.

In the case of *Hastings & Dakota Ry. Co.* v. *Whitney*, 132 U. S., 357, Mr. Justice Lamar thus defines a homestead entry:

"Under the homestead law three things are needed "to be done in order to constitute an entry on public "lands. First, the applicant must make an affidavit "setting forth the facts which entitle him to make such "an entry: second, he must make a formal application: and, third, he must make payment of the money "required. When these three requisites are complied "with and the certificate of entry is executed and deliv-"ered, the entry is made, the land is entered."

Great weight will be acceded to the opinion of Mr. Lamar on this point, from the remembrance of his

having passed onto the Supreme Benchfrom the Secretaryship of the Interior Department and his familiarity with the Public Land System.

The word "entry" is not one of common but of technical use, and it must be interpreted in an indictment in its technical sense.

Chotard v. *Pope*, 12 Wheat., 588.

The charge that defendants conspired to defraud the government by means of false entries to lands under the homestead laws will thus be seen to be a charge of an innocent act. The government cannot be defrauded by such entries (*United States* v. *Thompson*, 29 Fed., 86. Opinion by Deady, J.) It is, indeed, a commendable act to encourage the taking of homesteads on the public domain.

It is not asserted that any defendant was to derive any benefit from the entries to be made. No prior residence, settlement or improvement is necessary to such entry, (Sec. 2289, Revised Statutes, as amended by act of March 3rd, 1891, 26 St. Large, 1095) and if made and afterward abandoned, neither is the government defrauded or any crime or offense been done by the means.

The object of the alleged conspiracy being to procure entries under the homestead laws, the indictment should point out in what particular the entries were to be false. A true entryman would need be possessed of the following qualifications. (Sec. 2289, Revised Statutes.)

(*a*) Head of a family or over twenty-one years of age.

(*b*) Citizen of the United States or had declared his intention to become such.

(*c*) Not the proprietor of 160 acres of land in any state or territory.

(*d*) Have *bona fide* intention to make it his home.

Whether the object was to procure entries by persons lacking one or more of the above qualifications, or to procure entries in name of fictitious persons, the pleader has not chosen to reveal.

Second: No mention is made of the United States of America.

The federal constitution fixes the name of our government, and it hardly comports with the dignity of a Federal Court to accept a nickname in lieu of the name designated by the constitution.

Third: No overt act is mentioned as being "to effect the object of" the words the statute uses.

The words "according to and in pursuance of" may possibly be equivalent under certain circumstances and might mean something the same; and similar words have been used by eminent jurists in commenting upon indictments under Sec. 5440; but notwithstanding, the statute requires that the act be done "to effect the object" that is, some act done with a view in the mind of a conspirator of accomplishing the desired object; some potent act which will suffice and attain the goal of their efforts; something put into motion which if not thwarted will result in a fraud on our government, while the words "according to and in pursuance of" import any trivial act which may merely reflect the existence of a conspiracy. "To effect" gives to the mind the idea of power, of sufficiency.

It will not be contended for a moment but what that part of Sec. 5440 which relates to an overt act is a statutory enactment, and it is unnecessary for me to quote the authorities for contending that in an indictment under this section the words of the statute must be strictly fol-

lowed, which are, "And one or more of such parties do any act to effect the object of the conspiracy." It is no matter how many acts are done in pursuance of, there must be one done to effect the object.

Under section 5440, Revised Statutes, the criminality consists in—

1. Conspiracy to do something. 2. Some act to effect its object.

While it is true that the criminality lurks in the conspiracy—while the gravamen of the offense is the meeting of the minds to do some unlawful act

United States v. *Britton*, 108 U. S., 199.
Pettibone v. *United States*, 148 U. S., 197.
United States v. *Hirsch*, 100 U. S., 33.

still there can be no notice taken of the insipient conspiracy until some act is done to effect its object. No overt act was necessary at common law to constitute the offense; but the common law has been modified in this respect by our statute, so that an indictment under section 5440 must specify one or more acts done by some conspirator.

United States v. *Britton*, 108 U. S., 199.
Pettibone v. *United States*, 148 U. S., 197.
United States v. *Hirsch*, 100 U. S., 33.

The same formality, strictness and accuracy attend the charging of the overt act as in charging the conspiracy—as in charging a separate substantive crime—as in charging murder, arson or perjury, were the overt act murder, arson or perjury.

Wright on Conspiracy, 209–211.
1 Second Star Route Trial, 630–633.
United States v. *Hess*, 124 U. S., 483.
Pettibone v. *United States*, 148 U. S., 197.

In the Pettibone case our present learned Chief Justice uses the following language:

"The general rule in reference to an indictment is "that all the material facts and circumstances embraced "in the definition of the offense must be stated, and that "if any essential element of the crime is omitted, such "omission cannot be supplied by intendment or implica-"tion. The charge must be made directly and and not "inferentially or by way of recital."

Fourth. No date is given for any alleged overt act.

Fifth. No overt act is alleged to have been done within the United States—where the inducing and pursuading was done is an enigma; it does not matter where the witnesses or claimants were; the question is: Where were the defendants when the overt acts were done? The only act charged against any defendant is that of inducing and persuading; nothing more. For all that appears the defendants did the acts of inducing and persuading beyond the line into Canada, and the witnesses and claimants afterward came across the line to do the acts regarding which they were induced and persuaded. To charge the conspiracy proper as having been done in a foreign land would at once brand the indictment as fatally defective. Then why will not the same reasoning apply as forcibly to an allegation of an overt act, which, for all that appears, may have been done in Canada?

Sixth: It does not appear that any claimant or witness was sworn or actually testified, or that any entry, filing or proof was ever made; or even if it be granted, for the sake of argument, that filings and proofs were actually made, and witnesses and claimants were actually sworn, still it does not appear when or where any such

filing or proof was made, or when or where any witness or claimant was sworn.

To be sure, it mentions H. H. Fritz as being the Clerk of the Court of Rolette County, and says that proofs and filings were to be made before him; but whether or not Fritz was ever in the United States, or whereabouts he was when all these proceedings were had, plaintiff in error is left to surmise and find out the best way he can.

If it be contended that the indictment alleges entries or proofs to have been actually made, then the following objections became apparent:

(*a*) No entry or proof is alleged to have been presented to any officer, or that any officer existed to receive it.

(*b*) None of the steps necessary to make an entry or proof have been set out. (See Act March 3, 1879, 20 Stat. Large, 472.)

(*c*) No entry or proof has been set out *in haec verba*.

(*d*) No two attending witnesses to any proof are mentioned. (See Sec. 2291, R. S.)

(*e*) No entry or proof is alleged to have been made within the United States.

(*f*) The Judge of the District Court of Rolette County is not said to have ever been absent from the county. (See Act March 3, 1877; 19 Stat. Large, 403; also see Circular Gen. Land Office, Feb. 6th, 1892, bottom p. 11.)

(*g*) No part of the testimony is set out so as to enable the Court to say if any proof showed a compliance with the law as to residence, improvements and cultivation. (See Sec. 2291, Revised Statutes.)

(*h*) No qualification of any homestead claimant as to age, citizenship or family relations is set out, (See Sec. 2289, as amended by act, March 3, 1891, 26, St. Large, 1095.)

Seventh: It does not appear that H. H. Fritz had any authority to administer any oath under the homestead laws of the United States.

The jurisdictional authority of an officer to administer the oath must be explicitly alleged.

Franklin v. *State*, 17 S. E. Rep., 987
2 Bishop Cr. Pleas., 905.
18 Am. & Eng. Ency. Law, 314.
2 Archibalds C. P. & P., 1719.
3 Russell on Crimes, *60.
State v. *Plummer*, 50 Me., 217.
Powers v. *State*, 17 Tex. Ap., 428.

Eighth: Neither the degree, estate, mystery or place of residence of any defendant is given in the indictment.

Wharton C. P. & Proc., 107.

Ninth: No overt act is set out which was done to effect any entry belonging to any defendant named in the indictment.

It will not be contended that any conspiracy is meant to be charged to procure third persons to make entries: no such language is used and no other entryman named and no allegation that any other entryman's name is unknown.

If the allegation were to procure a third person to do an act, such third person's name must be given or an excuse substituted.

United States v. *Simmons*, 6 Otto, 360.

Under the counts of this indictment it is immaterial whether or not any other person than those indicted made any entry or proof.

Tenth: The allegation that some defendant did persuade and induce certain filings and proofs to

be made (if it be granted for argument's sake that it asserts that such entries or proofs were made) are bald assertions of conclusions of law by the pleader. No fact is set out concerning any entry or proof; no ear mark is given by which the court can ascertain whether or not any such entry or proof be in fact what the pleader asserts it is. Elementary rules of criminal practice will not admit of such pleading.

In re Greene, 52 Fed., 112.

Eleventh. The overt acts alleged against the defendants to the indictment are all described with the following language with variations to fit the various counts:

"The said Allen did persuade and induce one, etc."

"The said Dealy did fraudulently and unlawfully "induce and persuade one, etc."

No act other than that of inducing and persuading is charged to any defendant.

The pleader has not stated how the inducing or persuading was performed, whether by acts, writings or words spoken. That inducing and persuading which was done is merely the conclusion of the pleader.

This being an absolutely necessary ingredient to the offense it is essential that the acts, writings or words be plead with as much certainty and precision as the circumstances will admit.

United States v. *Hess*, 124 U. S., 483.
United States v. *Pettibone*, 148 U. S., 197.
1 Chitty C. Law, 171-227-228
1 Archibald C. Pleas, 54-85-86.
Washburn C. Law, 134-146.
1 Bishop C. Proc., 81.
Stratton v. *Com.*, 10 Met., 220.
Com. v. *Tuck*, 20 Pick., 362.
In re Greene, 52 Fed., 111.

United States v. *Mann*, 5 Otto, 580.
United States v. *Cook*, 17 Wall 68.

And if the inducing and persuading was done by words written or spoken, such words must be set out at length—in haec verba—or some excuse given for failing to do so.

Dennistaun v. *Stuart*, 17 *Howard*, 606
Bradlaugh v. *Queen*, 28 Moaks Rep., 482.
United States v. *Kaltmeyer*, 16 Fed., 761.
United States v. *Noelke*, 1 Fed., 426.
United States v. *Fisler*, 4 Bliss., 59.
United States v. *Watson*, 17 Fed., 145.
United States v. *Wentworth*, 11 Fed., 52.
1 Arch. C. Pleas, Preface pp. 13, 14, 15.
2 Chitty C. Law, 307.
3 Chitty C. Law, 1039 (b.)
2 Roscoe C. Ev., 753.
2 Russell on Crimes, 359, Note 1, 374.
1 Wharton, 306.
Brown C. Law, 119.
State v. *Bryant*, 17 N. H., 323.

Since no word or writing which constituted the inducing or persuading has been set out, or excuse given, the necessary conclusion is that the pleader had in mind some act or acts which constituted the inducing or persuading; but as no act or acts is named or described, each count of the indictment must fall from such failure; stating a conclusion of the pleader will not suffice, nor can the pleader escape the necessity of fully describing such acts; to say that he did not know the circumstances surrounding the acts would be to admit that the pleader was imposing upon the jury and court, and that the jury presented the indictment without any evidence of the charge. The pleader and jury must have known the facts before the indictment was prepared and found.

United States v. *Bettilini*, 1 Woods, 654.
White v. *Queen*, 15 Moak, Eng. Rep., 356.

Twelfth. No mention of any intent is made within the indictment.

Taking up count ~~thirteen~~ 9, and those of like form:

The overt act charged is that "the said Allen did "persuade and induce one John Azure to make filing un- "der said homestead laws."

This count, in its charging part, describes the lands as "being public lands of the United States." Conceding, for the sake of argument, that the same land is meant in each instance, I would suggest that the allegations are repugnant and contradictory—how can land be public land at the date of the indictment, and at the same time have been filed upon? An entry instantly segregates it from the public domain.

Newhall v. *Sanger*, 92 U. S., 761.
Starr v. *Beck*, 133 U. S., 541.
H. & D. Ry. Co. v. *Whitney*, 132 U. S, 357, and cases cited.

Also see as to word "being" refers to the date of indictment, unless so qualified as necessarily referring to some other date.

Wharton C. P. & P., 132.
1 Bishop C. Proc., 410.
1 Chitty Crim. Law, 220.

Taking up count three, and those of like form:

The overt act charged is that "the said Dealey did "fraudulently and unlawfully induce and persuade one Frank Premeau to appear as a witness for one Charles Pattnaude in making final proof under said laws."

In a conspiracy under Sec. 5440, Revised Statutes, the steps must necessarily be chronologically as follows:

1. The meeting of the minds in one common object.

2. The performance of some overt act.
3. The accomplishment of the object.

No overt act is material after the object is attained. The object in this count being to make an entry, it is immaterial what was done concerning a final proof, which necessarily must have been at least a month later than the filing.

See act, March 3, 1879, 20 St. Large, 472.

This count like all except the first fixes no date for either the alleged conspiracy or overt act. The words "at the time and place aforesaid" may refer either to the date of the indictment or to the date of the alleged conspiracy.

21 Am. & Eng. Ency. Law, 442.
State v. *McCracken*, 20 Mo., 411.
2 Kent Com., 555.

Pattnaude may have not resided on his land within five years prior to final proof and still have told the truth and made a valid homestead proof. He may have lived on the land ten years and made his filing April 2, 1884. In such case his final proof made on April 1, 1891 would be legal so far as residence is concerned, even had he not resided on the land at all since April 1st, 1886. The five years of residence required is the "five years immediately succeeding the time of filing the affidavit" and is not "five years immediately preceding the time of making said proof."

Revised Statutes, 2291.
United States v. *Singleton*, 54 Fed., 488.

The department of the interior has by a long line of decisions held that the five years of residence required

of a homesteader begins to run from the date of actual settlement and not from the date of formal entry.

Case of Pat Lynch, 7 Land Dec., 33, and land cases cited hereinbefore.

So that the act induced and persuaded was for all that appears innocent, lawful and exemplary.

Further objections to this count besides those already noted are:

1. The court was a court of record at the date of the indictment but not at the date of any final proof.

2. "In effect" is a conclusion of the pleader and not allowable in a criminal pleading.

Wood v. *Brown*, 6 Taunton, 169.
1 Chitty C. Law, 234-235.
Washburn C. Law, 149.
In re Greene, 52 Fed., 112.

3. Pattnaude does not appear to have ever filed a homestead entry for the land.

Taking up count eleven and those of like form:

The overt act is alleged to consist in "the said "Allen did persuade and induce one Leo Jennett to make "filing under said homestead laws and thereafter to "make proof and final entry under said laws for the "lands, etc."

This, the strongest count of all, is also fatally defective, for the reasons:

1. The reference to final proof is immaterial as any conspiracy had been accomplished by the making of the entry.

2. The land included in the charging part of the count was public land at the date of the indictment, and it does not appear how an entry or proof for some other land not included in the object of the alleged conspiracy could possibly be material or help to affect the object.

Taking up count one, which varies slightly from the others as to the charging part, and whose overt act is set out in the same language as that in number eleven. This court is open to the same objections as the others:

1. The reference to final proof is immaterial.

2. There is no connecting the land with the land described in the charge.

3. The pleader pleads his conclusions and does not set out any fact.

4. No time or place is given.

5. No ear marks of any entry or proof is given.

6. No word or writing is set out *in hæc verba*.

THE MEANS.

Crime must lurk somewhere between the four corners of the indictment; crime must be found somewhere in the charge of the conspiracy; the charge of conspiracy, if faulty, cannot be aided by averments of acts done by one or more of the conspirators to effect the object of the conspiracy.

United States v. *Britton*, 108 U. S., 199.
Pettibone v. *United States*, 148 U. S., 197.

Conspiracies are divided into

1. Conspiracies whose objects are statutory crimes.

2. Conspiracies whose objects are innocent but the means to be used are statutory crimes.

In the first class the OBJECT must be set out with fullness, accuracy and precision, for therein lies the crime.

In the second class the MEANS must be set out with fulness, accuracy and precision, for therein lies the crime.

The rule laid down by Shaw, C. J., in *Com.* v. *Hunt*, 4 Metcalf, 111. is adopted by this court in the case of Pettibone in its opinion delivered by Chief Justice Fuller in the following language:

"When the criminality of a conspiracy consists in "an unlawful agreement of two or more persons to com- "pass or promote some criminal or illegal purpose, that "purpose must be fully and clearly stated in the indict- "ment, while if the criminality of the offense consists in "the agreement to accomplish a purpose not in itself "criminal or unlawful by criminal or unlawful means, "the means must be set out."

Congress recognizes this classification in Sec. 5440, Revised Statutes.

If two or more persons conspire either—

1. To commit any offense against the United States, or

2. To defraud the United States in any manner or for any purpose.

Thus it would follow that in a conspiracy to commit any offense, no means need be set out; but in a conspiracy to defraud, the means must be set out.

Counsel for plaintiff in error can frame no words so expressive of the idea as those used by Mr. Stewart, at pages 6 and 7 of his brief for plaintiff in error in *Perrin* v. *United States*, 131 U. S., 55:

"If there was only one mode or manner by which "the United States could be defrauded, and if the con- "spirators could have only one purpose in defrauding "the United States, there might be some force in the "argument that a general allegation of conspiracy to "defraud the United States would be sufficient; but the

" methods which may be devised and the purposes which
" may be designed to defraud the United States are so
" multifarious that a general charge of conspiracy to
" defraud the United States does not furnish the accused
" with such a description of the charge against them
" as will enable them to make their defense or avail
" themselves of a conviction or acquittal for protection
" against further prosecution for the same cause."

If there could be any question on this point it would seem to be set at rest in this court by the Cruikshank case, 2 Otto, 542, wherein Chief Justice Waite says:

" So, too, it is in some states a crime for two or more
" persons to conspire to cheat and defraud another out
" of his property: but it has been held that an indict-
" ment for such an offense must contain allegations
" setting forth the means proposed to be used to accom-
" plish the purpose. This because to make such a pur-
" pose criminal the conspiracy must be to cheat and
" defraud, in a mode made criminal by statute; and as
" all cheating and defrauding has not been made crim-
" inal, it is necessary for the indictment to state the
" means proposed in order that the court may see that
" they are in fact illegal."

The pleader in the case at bar recognizes the necessity of setting out the means, as he inserts in each count —" by means of false, feigned, illegal and fictitious " entries of said lands under said homestead laws." To say that these words used by the pleader describes any crime would be doing violence to the English language: the words themselves are not so ominous as the conspicuous absence of any words describing any known offense to the law.

The pleader admits by this clause that he knew the means which he charges were to be used, but for some

reason unknown declined to inform plaintiff in error of what he must meet and prepare his defense.

Even were it unnecessary to set out any means, the pleader by doing so has chosen to confine the charge of criminality within the limits of the means stated; and if no crime be found therein, then would the indictment be bad for that reason alone.

In re Benson, 58 Fed., 962-970.

In this latter case the learned Judge Hanford, speaking on this very point, says:

"The use thereof necessarily limits by particular-
"izing the charge made in general terms. The court
"cannot ignore them."

Respectfully submitted,

A. A. Drake

Of Counsel for Plaintiff in Error.

Fargo, N. D., February 23d, 1894.

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OCTOBER TERM, 1893.

MICHAEL DEALY, PLAINTIFF IN error,
v.
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} No. 1035.

BRIEF FOR THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

MICHAEL DEALY, PLAINTIFF IN ERROR,
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No. 1035.

The plaintiff in error, Michael Dealy, was, on the 6th of December, 1892, in the U. S. district court for the district of North Dakota, jointly with William W. Allen, Edward Laberge, Peter Thibert, and H. H. Fritz, indicted for the crime of conspiracy to defraud the United States. The indictment contains seventeen counts, to each of which the defendants demurred and to certain of which the district attorney entered a nolle prosequi (p. 16).

On the 9th of January, 1893, all of the defendants, except Fritz, were found guilty as charged in certain of the counts (p. 16).

And on the 21st of July, 1893, the plaintiff in error was sentenced to imprisonment in the South Dakota penitentiary for the term of one year and one month and to pay a fine of $1,000.

The offenses whereof the defendants were charged and convicted were conspiring to defraud the United States of the title and possession of public lands of the United States, subject to entry under the homestead laws of the United States, by means of false, feigned, illegal, and fictitious entries of such lands as set forth in said counts.

That such conspiracies were effectuated by inducing certain persons to give false testimony in support of such entries and in support of the settlement, improvement, and residence upon said lands.

THE CASE.

There appears to have been a motion in arrest of judgment (pp. 17, 27) and a motion for a new trial (pp. 27, 28), the record showing (p. 28) that the prisoner was sentenced on the 21st of July, 1893, and that on the 29th of July, 1893, a bill of exceptions was allowed and filed in the case.

None of the testimony appears in this record, nor any certificate of facts proven, nor any statement of facts agreed; but the bill of exceptions alone (pp. 28–30) affords the only information as to what is said to have been proven at the trial.

The assignment of errors (pp. 33, 34) does not refer to the subjects of several of the exceptions embraced in the bill of exceptions.

We will, however, notice each of the grounds of error complained of, whether presented in the formal assignment of errors or in the bill of exceptions, although it does not appear that any of these exceptions were taken

and noted during the progress of the trial; but it does appear as though they were brought to the attention of the court for the first time when the bill of exceptions was presented to the court, after the prisoner had been convicted and sentenced (p. 28).

ARGUMENT.

It is assigned as error—

First. That the matter charged in the said indictment does not constitute a crime at common law or under any statute of the United States.

The matter charged in each of the counts of the indictment is, that the persons charged

> did falsely, unlawfully, and wickedly conspire, confederate, and agree together among themselves to defraud the United States of the title and possession of large tracts of land in said county, of great value, by means of false, feigned, illegal, and fictitious entries of said lands under the homestead laws of the United States, the said lands being then and there public lands of the United States, open to entry under said homestead laws, at the local land office of the United States, at Devil's Lake City in said State, with a statement of the means and manner by which said conspiracy was carried into effect.

Section 5440, Revised Statutes of the United States, provide:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such

> conspiracy shall be liable to a penalty of not less than one thousand dollars, and not more than ten thousand dollars, and to imprisonment not more than two years.

In *United States* v. *Babcock*, 3 Dill., 585, a conspiracy is said to be—

> a combination formed by two or more persons to effect an unlawful end, said persons acting under a common purpose to accomplish the end designed. It is not necessary that there should be an actual meeting of the parties, or that there should be a formal agreement for the unlawful scheme, or that they should state in words or writing what the unlawful scheme is, or the details by which it is to be carried out. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. Every person thus contriving becomes a member of the conspiracy, although the part he was to take therein was a subordinate one, or was to be executed at a distance remote from the other conspirators. (*Re. Wolf.*, 27 F. R., 606; *United States* v. *Thompson*, 12 Sawyer, 151.)

Second. That the crime charged in the indictment of conspiracy, being a misdemeanor, is merged in the higher crime alleged in said indictment as committed by the defendant, to wit, the crime of subornation of perjury.

This objection admits the existence of two distinct offenses, to wit, "conspiracy" and "subornation of purjury," and the contention is that a person who is guilty of both can not be indicted and punished for both, but only for the greater offense, into which it is said the lesser is merged and lost.

In 1 Bishop on Criminal law, section 814, the author says:

> A conspiracy to commit a felony is a step toward the consummation, but it is only misdemeanor. There are American cases which seem to hold that if parties are on trial for such a conspiracy and they are shown to have proceeded in it, to the actual commission of the felony, the misdemeanor is merged and they can not be convicted—a rule, the authorities agree, not applicable where the object of the conspiracy is a misdemeanor. This doctrine is contrary to just principle. It has been rejected in England, and though there may be states in which it is binding on the courts, it is not to be deemed general American law.

And Dr. Wharton, in his Criminal Law, vol. 2, sec. 1344, says:

> The technical rule of the old common-law pleaders, that a misdemeanor always sinks in the felony when the two meet, has in some instances been recognized in this country, though without good reason. In England, as has been already noticed, the inconvenience of the principle, as well as its absurdity, has attracted grave judicial scrutiny, and eminent judges have declared they felt no disposition to extend a rule by which a man when indicted for a misdemeanor was acquitted because it was doubtful whether the offense was not a felony, and who, when indicted for the felony, was acquitted because it was doubtful whether the offense was not a misdemeanor.

In *United States* v. *Rindskopf* (6 Biss., 265), Hopkins, J., said:

> The fact that each of the overt acts constitutes an offense is no answer to this indictment for conspiracy. Upon a charge of conspiracy an overt act, which is

itself criminal, may be proven to show the existence of the conspiracy charged. * * * The common design is the essence of the charge, and may be shown by circumstances and the acts performed by the different alleged conspirators; and the fact that the several acts constitute separate criminal offenses does not exonerate the parties from the crime of conspiracy or bar a prosecution therefor. This is sustained by an almost unbroken chain of authorities, both in this country and England. (There are cited here the cases of *Commonwealth* v. *Warren*, 6 Mass., 74; *Commonwealth* v. *Davis*, 9 Mass., 415; *United States* v. *Boyden et al.*, 1 Lowell, 266; *People* v. *Mather*, 4 Wend., 259; *Collins* v. *The Commonwealth*, 3 Sergeant and Rawle, 220.).

The case of *Commonwealth* v. *Kingsley* (5 Mass., 106), which lays down a contrary doctrine, has never been followed, but has been ignored in the later cases and directly questioned in *Commonwealth* v. *O'Brien*. (12 Cush., 84.) See, too, *United States* v. *Milner* (36 F. R., 890); *United States* v. *Smith* (2 Bond, 323).

Third. That the evidence given in support of the indictment does not constitute a crime against the United States.

As neither the evidence, or facts proven, appear in this record, it is impossible to test the correctness of this objection.

Fourth. That the evidence does not show a conspiracy, etc.

To which the answer is the same as to the third.

Fifth. That it does not appear from the indictment that the lands in regard to which the conspiracy was formed are situated within the jurisdiction of the said district court.

The offense charged is the one created and defined by the statute law of the United States; and that is charged in the indictment to have been committed "in the county of Rolette, State of North Dakota, and within the jurisdiction of this court."

But if it were necessary to go further and show that the lands in regard to which the conspiracy was formed were also within the jurisdiction of the court, it will be seen that the indictment does describe said lands as "large tracts of land *in said county*" (p. 5).

And as every subsequent count of the indictment describes the quarter sections of land by latitude and longitude, that of itself ascertains and determines their exact location.

Sixth and seventh. That the court overruled a motion in arrest of judgment and a motion for a new trial.

These are matters resting altogether within the discretion of the trial court and are not reviewable here.

The rulings objected to and which appear in the bill of exceptions are as follows:

(1) To not allowing the defendant a fourth peremptory challenge.

Section 819, Revised Statutes, provides:

> * * * and in all other cases, civil and criminal, each party shall be entitled to *three* peremptory challenges.

It was doubtless upon this ground that the defendant's claim to a fourth peremptory challenge was denied.

(2) To allowing the witness to the prosecution, Frank Preman, to testify to the contents of a list of lands in the absence of the written list (p. 29).

The witness proved that the original list had been in his possession, but that after diligent search and inquiry he had been unable to find it (p. 29).

The proof by secondary evidence in such cases is clearly admissible. (*Renner* v. *The Bank of Columbia*, 9 Wheat., 581.)

(3) To the question propounded by the prosecution to its witness Frederick Swan, which was objected to as "leading."

The answer to the question is not given, nor does it appear from the bill of exceptions that the witness answered the question at all. It is the answer and not the question by which the defendant could be possibly injured, and the rule is an invariable one that the exception must fail in the absence of the answer.

(5) To the refusal of the court to dismiss the case on motion of the defendants, on the ground that the particular land, out of which the United States was alleged to have been defrauded, did not belong to the United States.

The question of ownership of that land was one which the court might properly leave to the determination of the jury, and the defendant should have asked for an instruction that the verdict be for him if the lands in question should be found not to belong to the United States. (*Marshall* v. *Hubbard*, 117 U. S., 419.)

(7, 8, 9, and 10) These have already been considered.

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

The original brief for the United States in this case was prepared and printed before the brief for plaintiff in error had been received.

The assignment of errors (p. 33) and the bill of exceptions (p. 28) afforded the only means by which counsel for the Government could be apprised of the grounds on which plaintiff in error relied for the reversal of the judgment below.

It appears, on page 15 of the record, that the defendants demurred to each and every count of the indictment; but it also appears from the order of court entered in the proceedings upon that day, that the demurrer upon which the court passed was a demurrer to the whole indictment and not to each of the counts thereof (p. 15). And it was to the ruling of the court in overruling that single demurrer

that the plaintiff in error excepted. It further appears (p. 28) that the bill of exceptions was tendered on the 29th of July, 1893, while the defendant had been convicted and sentenced on the 21st of July, 1893; and it does not appear that any single exception had been taken or noted during the progress of the trial, or at any time prior to the 29th of July, after the defendant had been convicted and sentenced.

From the assignment of errors (p. 33) it appears that the objection urged to the indictment was, that the matter charged therein "does not constitute a crime at common law or under any statute of the United States; that no count of said indictment states facts sufficient to constitute a crime or offense against the laws of the United States. But, as it already appeared in the record, that the court had passed only upon a demurrer to the whole indictment, and had not passed upon a demurrer to any single count thereof, this assignment of error, taken as a whole, is bad."

The second assignment of error is on the ground of "merger," and to that ground the brief for the Government was principally directed.

The brief now filed for the plaintiff in error is imposing in its aspect and appalling in its display of points and authorities. We will endeavor to notice these as far as it may appear to be necessary to an intelligent and reasonable presentation of the case.

First. It is objected that the indictment charges the plaintiff in error seventeen different times in the same identical words, adding to each charge a different "overt

act." And it is insisted that this is in fact an indictment with but one count, charging but one offense, but instancing seventeen different overt acts in the commission of that offense. And it is argued that inasmuch as the jury has found the plaintiff in error guilty on ten of these alleged counts that it has acquitted him on all the others. And as the whole seventeen are in fact but one count that such an acquittal must be held to be an acquittal on that one count. The same logical process by which this result was reached, may, without violation of law or reason, establish the defendant's conviction on all the counts, because he is convicted on some. But treating all the counts as one count, with seventeen overt acts, the verdict of the jury may be regarded as ascertaining that the overt acts recited in the counts upon which plaintiff in error was not convicted, were not committed under or in pursuance of the conspiracy.

Second. It is objected that the charge of conspiracy under section 5440, Revised Statutes, is faulty, and its faults can not be repaired or supplied by the allegations of the overt acts.

The fault, which it is said exists in the count is in describing the land, of which it is charged the conspiracy was formed to defraud the United States, as—

> Certain lands in said county, being public lands of the United States of great value, opened to entry at the local land office.

Without pausing now to consider how far this quotation from the indictment is accurate, but taking it as it stands in the brief, we have to say that, referring to the standard

work to which counsel in his brief has directed us (Wharton's Precedents of Indictments and Pleas), we find that the only precedent which the author has adopted and cites as a model, section 645, is one taken from 2 B. & C., 618, "an indictment for conspiracy to disturb a party in the possession of his lands." And there we find the land described as follows, as "certain manors, messuages, lands, and hereditaments and premises, situate and being in the said county of J., of which he, the said G. J., then was and for a long time had been peaceably and quietly possessed."

We do not find the land described there by metes and bounds, or as the only land possessed by G. J., in the county of J.; or indeed, described in any other way than the land referred to this indictment.

In a proceeding to recover the possession of land, or it may be for a criminal trespass on land, a more specific description might be required. But here the subject of the indictment is a conspiracy under the statute. The land is referred to as the merest incident. But counsel insists that there must be as full and accurate a description of this land as would be required in an action of ejectment. He says, it will not suffice to charge an offence in the general words of a statute; and he quotes from *United States* v. *Hess* (124 U. S., 483):

> It must be accompanied with such a statement of the facts and circumstances as will inform the accused of a specific offense, coming under the general description with which he is charged.

It is always dangerous to hazard wide deductions from single cases. The deceit that lies in generalities is nowhere so deceitful as in those broad generalizations which are

drawn from expressions and phrases, and even opinions upon the facts, of single cases. Of course it is true that the accused must always be informed by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense. But each indictment must stand upon its own merits, and in every case it will be found that the indictment has been declared bad on demurrer, because of some defect peculiar to it.

In the *United States* v. *Cruikshank* (92 U. S., 542), to which counsel in his brief so often refers, the indictment charged the defendants with the intent to hinder citizens in the free exercise and enjoyment of all the rights, privileges, and immunities granted and secured to them as citizens, etc. But it failed to specify any particular right, the enjoyment of which the conspirators intended to prevent.

In *United States* v. *Walsh* (5 Dill., 58), the indictment charged a conspiracy to defraud the United States "in certifying that certain false and fraudulent accounts and vouchers were true and correct." But it did not aver that all the accounts and vouchers were false and fraudulent, nor did it indicate to the defendant what certain accounts and vouchers were referred to.

Now, Mr. Justice Dillon, in that case, after holding that an overt act was necessary to complete the offense under section 5440, and after defining the requisites of an indictment under the United States statutes, proceeds to declare that the means by which the fraud is to be effected must

be set forth in some part of the indictment. And yet, in the same year (1878) in which that opinion was delivered in the circuit court of Missouri, Mr. Justice Woods, in the circuit court of Louisiana, in *United States* v. *Goldman* (3 Woods, 187), held, that where in an indictment a conspiracy is stated and its object, it is not necessary to state the means to be employed, and in a note appended to the report of that case in 12 Myers' Fed. Dec., sec. 2290, the decisions on both sides of this question are stated and the result reached "that the better reason is with those who deny the necessity of the means by which the conspiracy was to be carried into effect."

And in *United States* v. *Gordon* (22 Fed. Rep., 250) it was held that an indictment under section 5440 was not demurrable, because the charge of conspiracy to commit a fraud was made without setting out the means by which the fraud was to be consummated.

And in *United States* v. *Dustin* (2 Bond's Rep., 332) the court said the statute referred to is far reaching and includes every conspiracy to "defraud the United States in any manner whatever. It is sufficient in an indictment under this law to aver that there was a conspiracy to defraud the United States of taxes legally due; and that in pursuance of such a conspiracy the defendants committed a stated overt act. It is otherwise where a conspiracy is relied on as the criminal act, without any averment of an overt act to effect the object of the conspiracy. In that case all the facts must be averred which constitute the conspiracy."

It is further held in that case to be the general doctrine—

> That the allegations of the overt act are not required to be as full and minute in an indictment for conspiracy as in an indictment for fraud without any charge for conspiracy. If an overt act, in violation of law, is charged as in pursuance of a previous conspiracy, it is sufficient. (*United States* v. *Gooden*, 12 Wheat., 460.)

And in Wharton's Precedents, section 607, cited in the brief of plaintiff in error, we find, on page 436, the law thus stated:

> It is enough, therefore, for the pleader to set out the offense aimed at by such apt words as will describe it as a conclusion of law. Thus, it is sufficient to say that the defendants conspired "feloniously, willfully, and with malice aforethought to kill and murder, etc.," without describing the weapons to have been used (*State* v. *Dent*, 3 Gill & John., 8); or that they conspired "certain goods and chattels of great value, etc., then belonging to and on the person of the said A. B., feloniously to steal," without going on to mention what those goods and chattels were. (*Com.* v. *Rogers*, 5 S. & R., 463.) This liberality, in fact, is extended to every case where an attempt is made to commit an offense itself indictable, whether by one or by a confederacy. (Ach. C. P., 5 Am. ed., 262; *People* v. *Bush*, 4 Hill, N. Y., 133.)

And in *United States* v. *De Grieff* (16 Blatch., 20–29), the indictment was under section 5440, charging a conspiracy to commit one of the offenses against the United States created by section 5443. It was objected that the indictment was bad for uncertainty, because it omitted to state facts showing the commission of a fraud upon the United

States, because the contents of the papers are not so stated as to enable the court to see that they contain evidence of fraud. The court said:

> The difficulty of this argument is that it proceeds upon the assumption that the substance of the offense charged is the fraud upon the United States in the importation of the merchandise described. But the indictment is for the conspiracy to commit an offense against the United States, not for a fraud upon the United States. The rule applicable to indictments of this character has been thus stated: "When looking at a charge of conspiracy to commit an offense, we do not require it (the offense) to be set forth with all the precision requisite in describing the offense itself." (*Latham* v. *The Queen*, 5 Best & S., 635.) The result of the cases upon the subject in this country is thus stated in *State* v. *Keach* (40 Vt., 113): "The adjudged cases uniformly recognize the rule that a general allegation that two or more persons conspire to effect an object criminal in itself, as to commit a misdemeanor or felony, is sufficient, even though the indictment omits all charges of the particular means to be used." In *State* v. *Parker* (43 N. H., 83) it is said: "If it (the object of the conspiracy) is not an offense at common law, but only by statute, the purpose of the conspiracy must be set forth in such manner as to show that it is within the terms of the statute."

In *Pettibone* v. *United States* (148 U. S., 202) Chief Justice Fuller, in defining a conspiracy under section 5440, accepts the rule laid down by Chief Justice Shaw:

> That when the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal

> purpose, that purpose must be fully and clearly stated in the indictment. While, if the criminality of the offense consists in the agreement to accomplish a purpose not in itself criminal or unlawful, by criminal or unlawful means, the means must be set out.

The indictment in that case averred that the defendants conspired by intimidation to compel the officers of a mining company to discharge their employés; and the employés to leave the service of the company. Such a conspiracy was not an offense against the United States, though it was against the State. The combination to commit an offense against the United States was averred to consist in a conspiracy against the State; but there was no averment that the purpose of the conspiracy was the interruption of the course of justice in the United States court. So the indictment did not charge a conspiracy to effect an object prohibited by the laws of the United States, or to affect a lawful object by criminal or unlawful means.

And in *United States* v. *Britton* (108 U. S., 206), the objection to the indictment was not that it did not adequately and aptly charge the offense, but that the offense so charged, to wit: procuring a dividend to be declared by a national bank when there were no net profits to pay it, was not a criminal misapplication of the funds of the bank.

Tried by the tests furnished by these cases, let us see if the counts in the indictment here sufficiently charge the offense of which the plaintiff in error has been convicted.

1. It charges the object and purpose of the conspiracy to be to defraud the United States of the title and possession of public lands of the United States.

2. It charges the means by which the conspiracy was to be effected to be false, feigned, illegal, and fictitious entries of said land.

3. It charges the overt act, specifically in each count of the indictment.

4. It charges who the conspirators were by name.

Third: But it is objected, on behalf of the plaintiffs in error, that the "false, feigned, illegal, and fictitious entries" is not an adequate charge of "means" by which the conspiracy is to be carried out. Because, it is said, these words "admit of the interpretation of forgery." Well, suppose they do, and the charge was that the conspiracy was sought to be effectuated by means of forgery? Will it be said that that is not an unlawful means? We have seen from the authorities that where the object of the conspiracy was an unlawful one it is unnecessary in the indictment to specify means.

But here both the means and the object are unlawful. If we understand the meaning of counsel aright, it seems to be that each averment of the means employed, however numerous and varied the means may be, raises a distinct and substantive issue which is to be plead and proved with as much distinctness as if it constituted the gravamen of the case. He argues that if this were a "forged entry or patent obtained by means of forgery it could not bind the United States."

And he further argues that if there had been an entry of this land that such an entry divests the title of the

United States, and they cease to be the owners of the land; and he concludes from this (p. 17) that, therefore, "the charge that the defendants conspired to defraud the Government by means of false entries to land under the homestead laws, will thus be seen to be a charge of an innocent act;" which argument seems to be as astounding in law as it is in morals, because it amounts to this: that if A, and B, and C, conspire to obtain from D a deed conveying the title to his land, by means of falsehood, fiction, illegality, fraud, or forgery, that they can not be indicted for conspiracy, because their conspiracy having proven successful in inducing D to divest himself of his title, the charge of conspiracy against them becomes the "charge of an innocent act."

Or, again, if the conspiracy had succeeded up to the point of the execution of the deed of conveyance by D, but had been discovered before the delivery of the deed, that it would still be an innocent act, because D had lost nothing.

In *United States* v. *Minor* (114 U. S., 234), a bill was filed to set aside a patent issued by the United States to Minor on the ground that it had been obtained by false and fraudulent representations; that the land officers of the Government had been deceived and misled into issuing the patent by false affidavits. Mr. Justice Miller, delivering the opinion of the court, said:

> Is there anything in the circumstance that these misrepresentations were supported by perjury; that the defendant made oath to his falsehoods and procured a false affidavit of a witness to corroborate himself, which should deprive the injured party of relief.

> It would seem, rather, to add to the force of the reasons for such relief that fraud and falsehood were reinforced by perjury.

The conspiracy of itself, without regard to its success or failure, or the means employed for its accomplishment, is made a distinct offense by the statute. And, even although it had so far succeeded as to obtain a patent from the United States for the land, yet the title of the Government was not divested by a patent so obtained, and the land still remained "public lands of the United States," subject to bona fide entry by lawful purchasers from the Government.

Fourth. It is objected, again, that the language of the statute is "to effect the object;" whereas the language of the indictment is "according to and in pursuance of."

It appears that this point has been made before, but the lesson to be drawn from the experiment has been disregarded by the counsel here. In *United States* v. *Boyden* (1 Lowell, 266; 12 Myers' Fed. Dec., sec. 2295) it was said:

> So in New York and New Jersey, where the statutes require some act to be done to "effect the object" of the conspiracy, indictments follow the more usual language adopted in this case and charge the acts as having been done in "pursuance" of the agreement (*People* v. *Fisher*, 14 Wend., 9; *People* v. *Chase*, 16 Barb., 495; *State* v. *Norton*, 3 Zab., 33). The rule of pleading which requires a crime to be set out in the words of the statute is not applicable when the acts set out are no part of the offense, but mere inducement.

Fifth. It is further objected that no date is given for any alleged overt act; that no overt act is alleged to have been done within the United States; that the overt acts are inadequately described. To all of which it may be replied, that while an overt act is necessary to complete the offense under the statute, yet no more is required than to apprise the defendant with reasonable certainty of the acts with which he is charged; and the counts do all charge that the false affidavits were made before the clerk of the district court of the State of North Dakota in and for said county. And this court will take judicial notice of the fact that such clerk in his official capacity was duly authorized to administer such oaths. It is not necessary to set forth the county in which the conspiracy was formed, and if incorrectly set forth it may be rejected as surplusage. (*United States* v. *Smith*, 2 Bond, 323.) It is unnecessary to prove *intent;* that is inferred from the unlawful act of combining to defraud. (*United States* v. *Donau*, 11 Black, 168.)

The other questions raised in this brief have already been considered.

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